APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 35

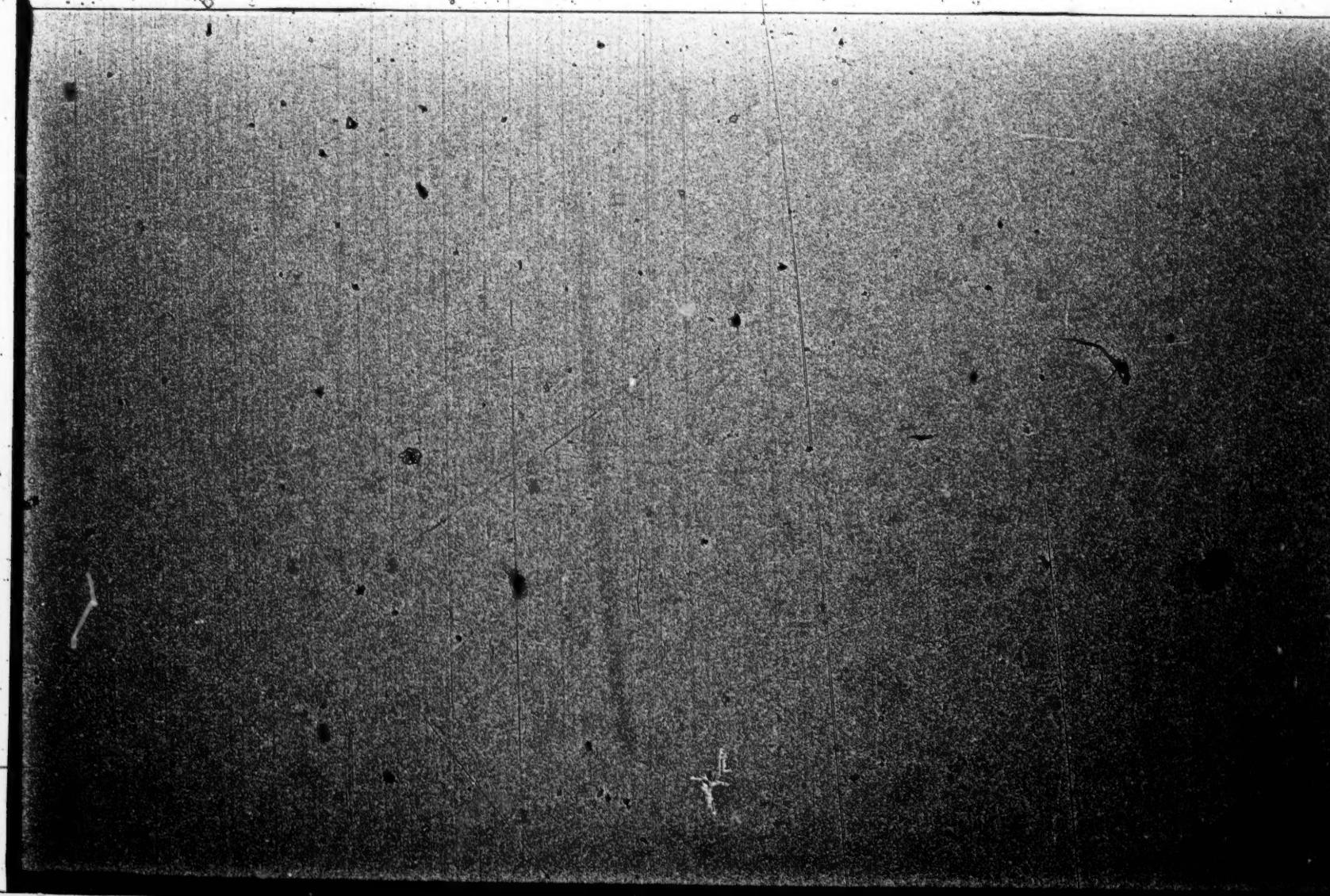
CARL F. GRUNENTHAL,
Petitioner,

v.

THE LONG ISLAND RAIL ROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1968
CERTIORARI GRANTED MAY 6, 1968



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Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

7-10-67 Filed record (original papers of District Court)

11-8-67 Argument heard (by: Lumbard, ChJ., Medina & Hays, CJJ)

1-11-68 Judgment Affirmed in Part and Action Remanded, Medina, CJ

1-11-68 Dissenting in part in separate opinion, Hays, CJ

1-11-68 Filed judgment

1-16-68 Filed order removing original record

1-24-68 Filed motion to stay issuance of mandate

2-1-68 Filed order granting motion to stay issuance of mandate

2-21-68 Certified original record and proceedings for Meyer, Lasch, Hankin & Poul, Esqs.

2-27-68 Filed receipt by Supreme Court of original record

2-29-68 Filed certificate of filing of petition for writ of certiorari

3-1-68 Filed notice of filing of petition for writ of certiorari

5-9-68 Filed certified copy of order of Supreme Court granting petition for writ of certiorari

Relevant Docket Entries

DISTRICT COURT

Nov. 29-63 Filed complaint and issued summons.

Dec. 26-63 Filed deft's Answer.

Feb. 21-67 Before Cooper, J Jury—trial begun.

Mar. 2-67 Trial concluded—Verdict for pltff on liability 2-28-67—Verdict of $305,000 for pltf 3-2-67.

Apr. 10-67 Filed memorandum Opinion #33408—each motion addressed to the alleged excessiveness of their verdict is denied—jury's verdict remains undisturbed —let judgment be entered—So Ordered—Cooper, J M/N.

Apr. 13-67 Filed order & Judgment #68,576 that pltff have judgment against deft LIRR in amt of $305,000 —Cooper, J judgment entered 4-13-67 Clerk M/N ENT 4-14-67.

May 8-67 Filed deft's notice of appeal—Mailed copy to Irving Younger, — Meyer, Lasch H & P MacIntyre, Burke &s & C.

June 21-67 Filed deft's notice of appeal—Mailed copy to Irving Younger, MacIntyre, Burke, Smith & C & Meyer, Lasch, Hankin & P.

EXCERPTS FROM TRANSCRIPT

(4) * * * The Court: Let the record show that from the very outset off the record we had a discussion with respect to trying the issue of liability first, and then going into the other stage of the case depending on what the jury did with the issue of liability.

* * * * *

(5) * * * Accordingly, unless there is some violent objection, I think we should go first to the issue of liability alone and then upon the verdict based on that issue proceed further.

* * * * *

(442) * * * The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have agreed upon a verdict. * * *

The Foreman: In announcing its verdict on the issue of liability, the jury responds to the following questions:

Was the railroad negligent on September 19, 1962?
Yes.

If so, did such negligence contribute in (443) any degree to the plaintiff's injuries?
Yes.

Was the plaintiff contributorily negligent? No.

Motion to Set Aside Verdict

* * * * *

The Court: Motions Mr. Gallagher and Mr. Gallagher and Mr. Cohalan.

Mr. Gallagher: Your Honor, in view of the fact that we are going to continue and the rule provides we can make the motions in writing, I thought perhaps that under the circumstances—

(444) The Court: Why don't you do it both ways? Do it now.

Mr. Gallagher: Right.

I now move to set aside the verdict on the grounds it is contrary to law and contrary to the weight of the evidence. I also move for a directed judgment for defendant notwithstanding the verdict.

Mr. Cohalan: I move to set aside the verdict in favor of the plaintiff on the grounds it is against the evidence, the weight of the evidence, and contrary to law.

The Court: Each motion is denied.

* * * * *

(447) * * * HAROLD HERBERT COHEN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

* * * * *

Direct Examination by Mr. Meyer:

Q. Doctor, you are a practicing physician in the City of New York, are you not? A. Yes, sir.

Q. You are a graduate of what institution in what year? A. McGill University in 1932.

Q. And have you specialized in any branch of medicine? A. Yes, sir.

Q. And what is that? A. Orthopedic and traumatic surgery.

Q. And with what type of medicine does that specialty treat? A. That concerns itself with diseases and injuries of bones and joints, the skeleton, namely.

(449) Q. For how long have you practiced in that specialty? A. For 32 years.

Q. Have you been certified by any medical board in that specialty? A. Yes, sir.

Q. And which board is that? A. The specialty board that deals with orthopedics called the American Academy of Orthopedic Surgeons in 1941.

Q. And your office is where? A. At 700 Park Avenue.

Q. Now, Doctor, you have seen and examined Carl F. Grunenthal, the plaintiff in this case, have you not? A. Yes, sir.

Q. You have not been called upon to treat him? A. That is correct.

Q. You examined him solely at the request of my office in order to obtain an independent opinion as to his condition and as to his progress, is that correct? A. Yes, sir.

Q. Now, when was it that we first requested (450) you to examine Mr. Grunenthal? A. March 13th, 1964.

Q. And at that time did you receive a history of what his problem was? A. Yes, sir.

Q. And his problem was confined to what portion of his body? A. To the right foot and limb.

* * * * * *

The Court: Doctor, have you examined—will you show it to the doctor at this juncture? Have you examined the exhibits for identification just referred to by counsel?

The Witness: No, sir.

(451) The Court: All right. Will you take a look at them, Doctor?

(460) * * * *Direct Examination by Mr. Meyer (Continued):*

Q. Now, Dr. Cohen, briefly from the records of the hospital will you be good enough to tell the Court and jury what had happened to Mr. Grunenthal from the time of his accident up to the time that you saw him in March of 1964.

* * * * * * *

(461) The Court: 2 for identification becomes 2 in evidence; 3 for identification becomes 3 in evidence; 4 for identification becomes 4 in evidence; 5 for identification becomes 5 in evidence; and 6 for identification becomes 6 in evidence.

(Plaintiff's Exhibits 2, 3, 4, 5 and 6 for identification received in evidence.)

* * * * *

A. He was first admitted to the Queens General Hospital on 9/19/62 with a severely crushed right foot resulting from an accident of a piece of lumber falling on his foot.

The history states, "While working he was loading railroad tires when one slipped and injured his foot."

The Court: Ties?

The Witness: It says "tires." It should be ties.

A. (Continuing) The report of the original findings are skimpy on this second ID which I am (462) holding in my hand.

The Court: You mean 2 in evidence?

The Witness: 2 in evidence, yes, sir.

A. (Continuing) But from a perusal of the later findings, I can state that he suffered a compound fracture. In other words, the skin was broken on the instep of the foot, the wound penetrated to the sole of the foot, the bones of the great toe joint were crushed and shattered, the joint—the ball of the joint of the great toe was injured, the metatarsal, which is the bone in front or what we call proximal to the ball of the joint was also injured. The second metatarsal, and I am indicating using my right hand as my foot, the second metatarsal was likewise fractured.

Later on—well, I won't go into that.

And so he had a pretty badly crushed foot.

The Court: That is what is revealed by the hospital records in evidence?

The Witness: Yes, sir.

The Court: All right.

A. (Continuing) Treatment consisted of application of a cast and although this report does not (463) indicate it, the foot must have been cleansed and cleaned to the best of the surgeon's ability, all loose pieces of bone were removed and as much replaced as was feasible was carried out.

Antibiotics were given to control the possibility of infection and then a leg cast was applied to the right limb.

That is the first admission from 9/19/62 to 9/26/62.

Among the antibiotics given were cormacedin, penicillin and so on.

The second admission was to the Brunswick General Hospital and there the admission date is 9/26/62. He was discharged on 10/10/62 and—

Q. That shows, Doctor, does it not, that he was transferred from Queens to Brunswick? A. To Brunswick, yes, sir.

Q. All right. A. At that hospital the diagnosis is essentially what I have indicated and what they did there was to remove the short leg cast. That gave him an opportunity to re-examine the foot and they cleansed it again and again put on another cast in an effort to obtain healing. (464) That was the first admission to the Brunswick Hospital.

Then the patient was next admitted on February 1, 1963 and was discharged on February 23, 1963. Again the diagnosis is the same, except that this time he had developed an infection and was admitted for infection of the wound and this was treated by means of foot soaks and antibiotics and finally he was discharged again with a cast on his foot. That was from February 1, 1963 to the 23rd.

The next admission was from December 10, 1963 to December 17th.

Q. I think you have one out of order there, Doctor. You have August? A. This is February, no—

The Court: Go on, you are looking at 5 in evidence.

The Witness: At 5, yes.

A. (Continuing) December 10, 1963 to December 17, 1963 and this time he was admitted because of impending gangrene to the foot. There had been a deterioration in the circulation of the foot during these months and there is a description here of deep red discoloration across the instep with an (465) ulcer over the foot and the impression—

The Court: A little louder, Doctor.

A. (Continuing) And the impression here of the doctor who subsequently operated on him was that of a post-injury vasal spasm which means a contraction of the blood vessels about the foot with ulceration, with an ulcer of the foot.

The Court: Would you explain that, Doctor? We have a general notion of what an ulcer means, but what is an ulcer of the foot?

The Witness: An ulcer of the foot is where there is actually a loss of skin and tissue beneath the skin. The bed is—the bed of the ulcer, that is, the part which you look down on, is unhealthy in appearance. It had a yellow—what is it called?—necrotic or a death-like appearance of tissues instead of being nice and bloody. There is no blood around the area so it is considered necrotic.

The Court: Is that what the report indicates?

The Witness: Yes, sir.

The Court: Was that the compelling cause for the operation?

The Witness: Yes. The vasal spasm, the (466) foot was about to die, they described it as impending gangrene and in order to improve the circulation which had suddenly —not suddenly, over the months had gradually been deteriorating, this other operation was done which Dr. Urb did and called it a right sympathectomy.

Now, that is—

The Court: What is that, now?

The Witness: That is an operation where an incision is made on the abdomen. All the abdominal structures are pushed aside and one works his way down to the spinal column. Now, along the spine there are two chains of nerves called sympathetic ganglia. They are little bead-like chains of nerves connected by little beads and these little beads send off tiny little filaments to the blood vessels of the limbs, one on each side and they control the amount of opening or closing of the blood vessels in your legs and, therefore,

indirectly the amount of nourishment which the tissues of your limbs should get.

Now, in injuries there is a condition called a vasospasm where because of poor nourishment to the tissues by the original accident or because of pain these tiny little blood vessels clamp down and (467) so blood cannot pass to the limb and gangrene is threatened.

The purpose of this sympathectomy is to remove these controls which maintain the closing down of the blood vessels.

Now, once that control of the sympathetic chain is removed, then the blood vessels open, because there is no more regulatory influence sent down from the spinal column to control the amount of opening or closing of the vessels.

The Court: Doctor, I am going to take over. It is not my function, but see if what I am about to state is in essence what you have been telling us.

As I gather it, the blood vessels carry blood to various areas of the entire body, carry food and oxygen to the tissues. Right?

The Witness: Yes, sir.

The Court: When the foot in this instance demonstrated a lack of nourishment, a lack of oxygen which the doctors indicated was producing this gangrenous condition, it was decided to perform an operation whereby the amount of blood going to the foot would be larger than what was going up to that time?

(468) The Witness: That's correct.

The Court: That is in simple language?

The Witness: Yes, sir.

The Court: This sympathetic system controls the area of the blood vessel and when controlling it the blood vessel opening shrinks then the amount of blood that goes in there, goes through, is diminished severely, is that right?

The Witness: That is correct, sir.

The Court: So what they were endeavoring to do was to release the sympathetic controls on the blood vessels to

the foot to the end that more blood would be going through the blood vessels and in that way the foot would get more nourishment and more oxygen?

The Witness: That is correct, sir.

The Court: Do I get a passing mark on that?

The Witness: Yes, excellent. You get an excellent. And that was the purpose of the operation. He was in the hospital for that from December 10th to December 17th, 1963.

Q. Now, may I interrupt you just a moment, Doctor, and this is because of an oversight on your (469) part.

Mr. Meyer: There was an in-between hospitalization which I will have marked for identification as P-7. I don't think it will add much but just for the sake of completeness, we will just refer to it.

(Plaintiff's Exhibit 7 marked for identification.)

Mr. Gallagher: I have no objection to it going into evidence.

The Court: Mr. Meyer, gentlemen, I want to talk to the marshal.

(Plaintiff's Exhibit 7 for identification received in evidence.)

(Pause.)

The Court: One more question and then I will remain quiet.

What do the reports show was the outcome of that sympathectomy? Does it show?

The Witness: It was too early, sir. He was only there a week.

The Court: All right. Go ahead, Mr. Meyer.

Q. Go back the next two months to the immediate (470) hospitalization in August of 1963 which is Plaintiff's Exhibit 7. A. Oh, yes, this is another admission to the Brunswick Hospital from August—looks like August

30th, 1963 to September 21st, and here skin grafts were done in an effort to replace skin which had been lost and resulted in formation of ulcers on the instep of the foot.

The Court: Where did they take the skin from?

The Witness: I know it was taken from the right upper thigh.

The Court: How do you know that?

The Witness: From having examined the patient, but it may now show it here, too, sir. I will just look at it.

The Court: All right, next question.

Q. Doctor, that was for the same condition, wasn't it? A. Yes, the operative record shows.

Q. And that was the same—

The Court: What does the operative record show?

The Witness: Full skin graft taken from (471) the anterolateral surface of the right thigh.

The Court: Does that disclose the area?

The Witness: Yes.

The Court: What area?

The Witness: That is the upper—

The Court: No, the actual skin, how much skin?

The Witness: Oh, yes, three by four centimeters.

The Court: Thank you, sir.

The Witness: That is about a little over an inch by an inch and a half of skin.

The Court: Yes, sir.

The Witness: The next—the last hospital admission—

The Court: Would you mind reading the number, Doctor.

The Witness: Then came the sympathectomy and then the next admission was from June 10, 1964 to June 16, 1964.

The Court: And that you get from Exhibit 5?

The Witness: This is Exhibit 6.

The Court: 6 I mean, yes.

Q. Doctor, before that date, you had personally (472) examined Mr. Grunenthal, is that correct? A. Yes, sir.

Q. Now, before then, going to Plaintiff's Exhibit 6, will you be good enough to tell us what your personal observations of him were when you saw him? A. Yes, sir. He was disrobed and first a visual inspection was carried out of his foot and then he was asked to walk and so on. He stood with the great toe very badly deformed, the foot was discolored, had a brown discoloration, the skin was thinned out and shiny in appearance and it was all in all a pretty unhealthy looking foot.

The ball of the great toe did not touch the floor at all. The toe was shortened and in the cocked-up or what we call a hammer position the adjoining second and third toes were likewise hammered; instead of lying flat they were in the hammer position.

He walked with a limp. There was scarring present over the foot. The foot was cold, it was not as warm as the opposite limb. He had the scar of the sympathectomy on his right lower abdomen.

Motions were very bad as far as the great toe joint was concerned. Actually, there was no (473) motion there at all. Neither the ball of the great toe joint, nor the terminal portion of the great toe joint showed any movement at all either on the part of the patient or when I attempted to move it.

There was swelling present at the base of the lesser toes. The movement of the other toes were poor. All he had was this type of a movement, indicating with my right hand. He did not have the normal grasping movement of the lesser toes.

Even the ankle showed some impairment in movement in one of the directions.

One of the main blood vessels to the foot did not show any blood passing through it compared to the opposite foot. We call that the dorsalis pedis vessel.

Mr. Gallagher: I didn't hear what that was described as, your Honor.

The Witness: The dorsalis pedis vessel.

The Court: The blood vessel.

The Witness: That is a blood vessel, sir, which runs over the instep.

There was numbness in the region of the great toe joint to pin prick.

The Court: What does that mean?

(474) The Witness: Well, when a pin was passed over the skin of the great toe, he did not have the same perception of feeling that he normally should have.

Q. What's the significance of that, Doctor? A. It indicates that the nourishment has been very bad and in all likelihood the nerve supplies have been injured. There were no other ulcers to the foot. Whatever ulcers he had had healed. I think that was the major finding.

The Court: What date was this, Doctor—

The Witness: That was March—

The Court: —that you examined him?

The Witness: That was March 13, 1964.

The Court: March 13th, 1964. All right.

Q. Now, so as not to hold you in court any longer than necessary, Doctor, let's go on from there and then get your opinion of his situation all at once.

There was a later hospitalization after you saw him at that time, is that right? A. Yes. May I go back just one step before I get to this?

Over the ball of the great toe there was a (475) quite bony prominence present which was quite painful to touch and it appeared as if it was getting ready to puncture the overlying skin. I forgot to mention that finding.

The Court: Doctor, may I just ask you, that finding, was that a softness?

The Witness: No, that was—

The Court: Hard?

The Witness: Bony, hard as if a piece of bone was trying to—

The Court: Get out?

The Witness: —get out.

The Court: All right.

The Witness: This last admission was from June 10, 1964 to June 16, 1964 at Brunswick Hospital and the purpose of this admission was to remove that piece of bone which I have just described. That was done.

Q. And that was operated on at that time? A. Yes, sir.

Q. Now, Doctor, let's go on to your examination again so that you will be able to tell us about his present condition: Yesterday I asked you to look at him again for that very purpose, didn't I? (476) A. Yes, sir.

Q. And did you make a complete examination of him and X-rayed his foot? A. Yes.

Q. And see what his present condition is? A. I did, sir.

Q. All right. Now, tell the jury and the Court, if you will, in what respect the condition of his foot has changed in any way, what its present condition is? A. Yes. The most startling change was that the right foot had now become warmer than previously noted. In other words, the sympathectomy now was functioning properly.

The Court: I'm sorry to interrupt you, but in effect that is the same as saying there was an increase of blood circulation in the foot?

The Witness: Yes, there was an increase of blood in the foot. It does not mean, of course, that the deep structures of the foot are getting the blood, but certainly the skin temperature is now warmer.

The Court: Yes, sir.

The Witness: That is all that a sympathectomy (477) does. It improves the warmth of the skin.

The Court: Yes, sir.

The Witness: The major portion—the rest of the examination was very much the same, except he now had a scar over the ball of the great toe where this mass of bone had been removed. He still walked with a limp. The appear-

ance of the foot was still very, very much the same; the skin was shiny and had a brownish discoloration. The shoe was worn in such a manner that it was obvious he was bearing most of his weight on the outerside of his foot. There was no wearing out of the shoe on the inner side compared to the left foot. The movements were bad. Both the—all the movements of the forefoot were bad and all—he had thinning of his calf to the extent of one inch. He had some thinning of his thigh musculature indicating that the weight was not being properly distributed on the limb, he was not carrying the same degree of weight and stresses on that limb. The X-ray showed that there was still demineralization of the bones of the ankle and foot.

The Court: What does that mean?

The Witness: Well, demineralization means (478) where there is a loss of salts in bony structures following an injury and if weight is not being property distributed on the limb, nature simply does not redeposit those salts again. They are just lost.

The Court: Does that in turn go back to a decrease in circulation? Does the circulation carry those ingredients as well?

The Witness: Oh, yes, yes, sir. The circulation is responsible for all that, yes, sir.

The Court: All right.

The Witness: I took X-rays of his foot and it demonstrated rather a severe injury to the inner part of his foot. The ball of the great toe was completely destroyed. There was no joint there at all. The last joint of the great toe was absent. There were pieces of bone scattered where they didn't belong. There was spreading of the bone fragments, and so on.

Q. Would it assist us, Doctor, if you were to show us the most recent X-rays as to what the present condition of the bones of the foot are? A. Yes, I think it might be of some help.

Q. Well, may we have that now?

The Court: Are you offering those in evidence?

(479) Mr. Meyer: I better have it marked, your Honor. I will offer two plates. I will ask the clerk to mark it.

The Court: These were taken yesterday?

The Witness: Yes, sir.

Mr. Meyer: Plaintiff's Exhibits 8 and 9.

The Court: Any objection, two X-rays taken yesterday, Mr. Cohalan?

Mr. Cohalan: No, sir.

Mr. Gallagher: No, sir.

The Court: Received.

(Plaintiff's Exhibits 8 and 9 received in evidence.)

* * * * *

(480) * * * The Court: Very well. Please continue. I'm so glad you are better accommodated. That is 8 in evidence.

The Witness: 8 in evidence. This is a picture of the patient's foot. The foot rests on the plate and the central ray comes down and gives this impression—I'm sorry, this impression. This view, the film on my left, is taken by the foot rolling over to the side a little bit this way, whereas this view here the foot is down flat on the plate.

These are—a foot has five metatarsals. This is the one adjoining the pinkie, so this will be called five, four, three, two, one. This is the great toe metatarsal.

(481) Now, what has happened here, it is difficult to reconstruct actually because this is just a mess of bone. This should in reality look very much like this one here except that it is a little bit shorter. This is the second metatarsal. The first metatarsal should look like this second metatarsal.

The Court: Can you all see?

Juror No. 7: I—

The Court: Won't you, if you don't mind—could you give the juror an extra seat? Oh, won't you move down?

Would you mind using a ruler?

May I interrupt. Show us a normal toe bone structure.

The Witness: This would be a comparatively normal bone structure. This is the second metatarsal. The first metatarsal should look like this, it should have a bulbous end called the metatarsal head. It should have a joint indicated by this line, then it articulates with a smaller bone called a phalanx.

Now, this is missing here. The great toe has two phalanges, whereas the lesser toes have three. There is the —well, this is not too clearly (482) demonstrated. Here perhaps, you see one here, one here and one here. Now, the great toe has two, one large one articulates with the metatarsal head and then a smaller one articulates with the proximal phalanx.

Now, the lesser bone corresponding to this bone here has been crushed and spread apart like a V. It's just been opened up. And you can see the big gaping hole in between here. The metatarsal head itself of this first metatarsal has been completely crushed and pushed over to a side. Look at this piece of bone lying right here. So that the joint is completely lost; there is no joint here at all. You notice there is a joint here and a joint here and here. Well, here there is no joint at all.

And the last joint has become stiffened. There is no joint surface here or here at all.

This little white line demonstrates the fracture of the second metatarsal, which Nature has healed. If you look closely you can see a little white line running through the center, whereas the one you can see the narrow is very evident by the black streak right through the center.

(483) These bones themselves, all these metatarsals are markedly thinned out. They should be of wider consistency. A normal foot would show one, perhaps one and a half times its width, and that we call an atrophy due to lack of weight bearing. The calcium material, the salt material simply is dissipated and shrinks away.

Now, this is the side view which I indicated of the same foot and once more you can see that this joint is completely disorganized. The bone, the proximal phalanx which articulates with the metatarsal has been fractured and spread apart and a piece of it has united to the metatarsal joint so that there is no joint there any longer.

Notice, the overall black appearance of the bone which indicates decalcification or demineralization.

Q. Does Plaintiff's Exhibit No. 9 add anything to that, Doctor? A. Not especially, sir.

Q. Then I don't want to take your time to go into it.

* * * * *

(484) * * * Q. Now, Doctor, from the X-rays you have given us a picture of the underlying condition of this man's foot.

Now, would you tell the Court and the jury what the appearance of the foot is and what you make of that? A. Yes, the entire foot is badly nourished. We are just looking at the bones. You don't see the ligaments or the blood vessels or the nerves in an X-ray of the bony structure.

(485) I think that the appearance of the foot speaks for itself, if we could get the patient here.

Mr. Meyer: With your Honor's permission I will ask Mr. Grunenthal to come up.

Mr. Gallagher: Your Honor, I am going to object to that.

The Court: Objection sustained.

Q. Well, suppose you describe it as best you can then, Doctor. A. I will try. There is a substance lost, soft tissue substance lost of the ball of the great toe. The ball of the great toe and the metatarsal is raised above the ground so that no weight falls on that part of the foot at all. It is fixed, it sticks up like a sore thumb, like a sore great toe. The skin is discolored. It has a brownish discoloration. It is shiny and atrophic in appearance.

Q. What does that mean? A. Which means that the nourishment to the foot is so bad that the skin shows the

unhealthy condition of the foot. The movement of all the toes is very bad, (486) it is poor; and all in all he's got a poor functioning foot.

The Court: I had to, as I understand the law, sustain the objection, but that does not prevent you from demonstrating with your hand again what you wish to understand with respect to the foot, in particular the fleshy portion of the foot.

Now, demonstrate that with your hand, using the flesh of your hand, if you wish.

The Witness: Well, the skin of the foot, for instance, hasn't got the normal hair on it that a foot normally has. It is smooth in appearance, it is shiny, it has a deep brownish pigmented appearance to the foot, to the skin, rather.

The toe is in the cocked-up position; it is pushed up. The second and third toes likewise are pushed up.

When you ask the patient to move his toes, instead of moving them in this position, he just has a little wiggle movement. The great toe cannot be moved at all. It hasn't got the function of weight bearing which a normal great toe has. A normal great toe which is flexible allows a patient to walk with a flexible gait. The great toe especially is (487) used for push-off purposes. When one walks he pushes off with the great toe and progresses in that manner. Once the function of the great toe is lost there is undue strain which falls upon all the joints of the foot and one has a painful foot and this is the condition.

Q. I beg your pardon? A. This is the condition we have.

Q. What, Doctor, in your opinion is the future of Mr. Grunenthal's foot? A. The foot is not a useful one for work requiring, standing or climbing or use of the foot in normal work, especially his type of work.

Q. And in your opinion is there anything that can be done to improve it in the future, or will it remain about the same, or will it get worse? A. Well, if the pain becomes unbearable, the only thing to do is to remove a portion of the foot.

* * * * *

(488) * * * Q. Assuming, Doctor, Mr. Grunenthal has had continuous pain in his foot up to the present time, what is your opinion as to what will be or may have to be done for the foot if that pain continues in the future? A. The combination of pain and loss of function in that forefoot renders that portion of the foot a pretty useless member and if the patient (489) refuses or is unable to live with the discomfort then we can offer him surgery to relieve him of that pain.

Q. Is there anything else? Any other thing than that that can be offered in your opinion for his improvement? A. No. As the skin breaks down, the skin is subject to infections and he will have to be treated for these infections. It may even break down again and form ulcers. Any slight trauma would cause a foot like this more likely to break down than a normal foot. So that it is a foot that will give him trouble as the years go on.

Q. Specifically may I ask you a question, Doctor, as to whether Mr. Grunenthal's foot in its present condition is more or less likely to breaking down and ulceration than the normal foot? A. I would say yes.

Q. Now, Doctor, in your opinion, specifically will Mr. Grunenthal at any time in the future be able to return to railroading work or any work requiring heavy work being done while on his feet? A. I would say no. I would say it would be extremely hazardous for him to do so.

(490) Mr. Meyer: You may cross examine.

Cross Examination by Mr. Gallagher:

Q. The last examination made was yesterday, Doctor? A. Yes, sir.

Q. Did you make any written report on that? A. Yes.

Q. May I see it, please? A. Here, sir.

The Court: Those are your own personal notes?

The Witness: Yes, sir.

The Court: I see it from a distance. They are handwritten notes.

The Witness: Yes, sir.

The Court: Yes.

Mr. Gallagher: Will you bear with me for a moment, please?

The Court: Surely. You have to examine it. You haven't seen it before.

Q. Outside of your notes, Doctor, did you render any kind of a written report to Mr. Grunenthal or his attorney? A. Yes, sir.

(491) Q. Was it typewritten? A. Yes, sir (handing).

Q. Oh, this is the one that you made back in 1964? A. Yes, sir.

Q. I was speaking of yesterday's examination. A. No, sir.

The Court: Mr. Clerk, would you mind marking for identification the handwritten notes.

(Defendant's Exhibit L marked for identification.)

The Court: Return it to the doctor.

Q. When you examined Mr. Grunenthal yesterday, Doctor, you testified that you found his right foot warmer, is that correct? A. Yes, sir.

Q. Is that considered an improvement as compared to the condition that you had noted before in 1964? A. I would think so, yes.

Q. Did you make any comparison between what you found in 1964 and what you found yesterday from the standpoint of either improvement or retard—or what would the other word be?

(492) Mr. Cohalan: Retrogression.

Q. —retrogression? A. Retrogression, yes. I compared it to my previous findings. There was—there were a few changes, and, as I say, the most remarkable one was the warmness to the foot. There was some lesser swelling over the base of the toes which he had originally shown. He showed swelling around the base of the toes. Well, that swelling had subsided. Of course, the bump on the

dorsum of the—on the ball of the great toe was now missing. It was replaced by a scar which was now tender.

Q. Would that be considered an improvement, Doctor? A. Well, yes and no. He's now replaced with a tender scar instead of a tender bony lump.

Q. Well, from a medical standpoint would you have any opinion as to whether or not that would impede his walking as compared to 1964 or make it easier for him to walk as of yesterday's date? A. The ball of the great toe doesn't hit the floor anyway so that I don't think that changed his gait very much.

Q. Would the fact that the right foot was (493) warmer indicate that the foot was getting more nourishment than when it was colder? A. I would say that the fact that the foot is warmer, indicates that the skin is getting more nourishment. I don't know whether the deep structures are.

Q. But at least some part of the foot is getting more nourishment than when it is cold, is that correct? A. Yes, so far as what we call the superficial circulation is concerned.

Q. Would that be any indication that more chemicals are flowing into the foot? A. I don't think they are because these metatarsal bones are still long and thin. They are not responding to weight bearing.

Q. Well, in answer to one of Mr. Meyer's questions, I may not have gotten it clearly. You indicated that certain physical findings that you found there yesterday would indicate that there would be a deterioration in the future.

Do you follow me? A. Yes.

Q. Well, my question now is does it necessarily (494) follow that the symptoms or the facts that you found or the conditions that you found that there will be a deterioration in the future? A. Well, actually he did have a recent infection, I think, in March of 1966. He developed an infection of the foot requiring care by a dermatologist. I think that type of foot is subject to infections and trouble. If you ask me when it will occur, I don't know.

Q. Did you look into the condition, the dermatitis condition that he talked about in March? A. No, it was not present when I saw it.

Q. Could that be caused by other causes other than this particular— A. Well, yes, an infection is an infection. It can be caused by any kind of infection, but I think that type of foot is more prone to infections than his sound opposite foot would be.

Q. Did you go in to any detail with Mr. Grunenthal as to the type of work that he did for the railroad? A. Well, it was my impression that it was a laboring, laborer's type of work; he was on his feet a lot and it required the usual work of a man (495) being on his feet. I didn't go into any great details.

Q. Is there any kind of work that you would recommend for a man with this type of disorder? A. I think a sedentary type job he should be safe, no one steps on his foot, if he keeps out of trouble.

Q. Can you give us an example of some types of sedentary job you think he can handle? A. Well, a desk job.

Q. A desk job in the railroad? A. Whoever has a desk job for him, I don't think it would make much difference, so long as he doesn't have to stand much and there is no chance of anyone stepping on his foot.

Q. Did you inquire of him whether or not he drives an automobile? A. I'm sorry, sir?

Q. Did you inquire of him whether or not he drives an automobile? A. I don't think I did.

Q. Well, what would your opinion be as to him working perhaps in some kind of capacity driving an automobile? Do you think he would be able to do that? (496) A. I think he should be able to drive a passenger automobile, I wouldn't say a truck or anything like that.

Q. Particularly one with an automatic drive on it? A. I think with an automatic drive he should manage, yes, provided it is not a full-day driving job.

Q. Well, can you tell us how long he would be able to drive an automobile during the day? A. Well, that is

difficult to say. A foot like that needs a little exercise and I would suggest exercise to him. To be seated in one place without getting a chance to sort of limber up; I would not advise that to this man.

Q. In other words, Doctor, you also say that it would be advisable for him to try to move around at least for limited periods during the day for it will improve the condition of the foot, is that correct? A. Yes, a little exercise should be good for him, yes, sir.

Q. As a matter of fact, that will improve the circulation, will it not, sir? A. Well, we always hope it will, we don't (497) know whether it would.

Q. Aren't the chances are that it would? A. I would suggest it to him with the thought that it might improve his circulation, yes.

Q. All I want to know now, Doctor, is, we are not faced with a man who is totally and completely disabled, are we? A. No, he can do sedentary work as I indicated.

Mr. Gallagher: Thank you very much.

The Court: Mr. Cohalan.

Cross Examination by Mr. Cohalan:

Q. I just want to know from the doctor whether they ever recommended an orthopedic shoe. A. No, I don't think I saw anywhere in the records an orthopedic shoe.

Q. Would that be of help to him? A. An orthopedic shoe would be of help, a well fitting custom shoe would be of great help to him, yes.

Q. That hadn't been utilized? A. No, if he hasn't—the records do not reveal that.

Q. Would that not also protect his foot from (498) outside trauma? A. That is hard. No shoe can actually be made that is so self-protecting.

Q. But some more so than others, is that right? A. Perhaps a little more so, but that is all.

* * * * *

By the Court:

Q. Doctor, will you indulge me for just a moment. We have always been told in a general way that Nature has these compensatory forces, that when there is an invasion, so to speak, that Nature redoubles its efforts to resist the invasion, whether it is by microbes or by some hurt or another kind. Am I making myself clear so far? A. Yes.

Q. When we receive a wound, we are told that there is an onrush of blood to absorb the injury. That is using that term rather loosely. But am I right so far? A. Yes.

(499) Q. What does medicine say? How does medicine account for the fact that when this man had this crushed foot, why is it that circulation diminished? What is there about the anatomical structure that doesn't call on the circulation to supply even greater abundance than normal? Why does it actually pull back, so to speak, or is there an answer? A. Well, I don't know if I can give you any answer to that, except that where the injury is severe enough, nature just can't cope with it up to a point. He didn't lose his leg, you notice. He could have lost it. And the sympathectomy perhaps saved his limb for him. So that when nature was given a chance of responding, locally there was so much damage done by the trauma that all nature could do was to just scar up the area, that is all.

* * * * *

By Mr. Gallagher:

Q. When you examined Mr. Grunenthal back in 1964, Doctor, did you have any opinion at that time (500) outside of railroad work whether or not he could perform any types of sedentary work at that time? A. Well, I had indicated he was unable to return to his work at that time, but from my examination he was totally disabled because we were dealing with a cold foot, the foot was still cold. I was still afraid that he might end up with an amputation and I so recommended it.

Q. Regardless of that, though, would he have been able to do some kind of sedentary work sitting at a desk? A. No, I would heartily say no.

Q. Well, would you be able to express an opinion as to at what point Mr. Grunenthal was capable of doing sedentary work? A. I would say somewhere between these last two examinations, sir. I couldn't tell you at what point.

Q. Would you say 1965, perhaps? A. Well, I saw him in March of 1964. By the time I saw him in 1967 he was still in a lot of pain with his foot. There is the pain element here, too. It is not only the poor functioning foot, but there is the pain element, too, so that would restrict the (501) amount of work he could do, even if it is sedentary.

Q. Would he be capable of some work perhaps even on a limited basis? A. On a limited basis, yes, I would say so.

* * * * *

(503) * * * FRED WURPEL, JR., called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Meyer:

Q. Mr. Wurpel, where do you live? A. Marysville, Pennsylvania, sir.

Q. And what is your business or occupation? A. I am now the acting general chairman of the Brotherhood of Maintenance of Way Employees.

* * * * *

Q. And does that brotherhood represent, or did it represent in 1962, the maintenance of way employees on the Long Island Rail Road? A. It did, sir.

Q. Now, your office is where? A. Philadelphia, Pennsylvania.

(504) Q. Are you familiar with the negotiated agreements between your brotherhood and the Long Island Rail Road from 1962 and prior to and since that time? A. Yes, sir, I am.

Q. So far as the maintenance of way men whom you represented, was there any compulsory retirement age required? A. No, we have no compulsory retirement agreements.

Q. Parenthetically, let me ask you this question for the record:

Carl F. Grunenthal was a member of your brotherhood in 1962 and before that time, was he not? A. He was, sir.

Q. What were the daily regular wage rates of an apprentice foreman in the year 1962?

Mr. Meyer: We will save time without your looking them up.

The Witness: All right, fine.

Mr. Meyer: Because they are stipulated.

Q. Can you confirm that the wage rate for an apprentice foreman on the Long Island Rail Road in 1962 and 1963 was $2.598 per hour? (505) A. That is correct, sir.

Q. That in 1964 it was raised to $2.688? In 1965 it was raised to $2.788? A. That's correct.

Q. In 1966 it was raised to $2.868? A. That is correct.

Q. And this year in 1967 as of January 1st it was raised to $3.0114? A. That is correct.

Q. Was there an agreement between the brotherhood and the railroad as to payment for overtime and for holiday or Saturday and Sunday work? A. Yes, we have a penalty rate time and a half time rate for anything over eight hours or over 40 hours in the week or on the rest days or on holidays, with double time commencing after 16 hours of continuous service.

Q. And that remains the same? A. That remains the same.

Q. And isn't it a fact, Mr. Wurpel, that all employees of the Long Island Rail Road who were members of your brotherhood and were working in October of 1964 by reason of an agreement between the brotherhood and the railroads, including the Long Island, (506) have now protected employment so that they cannot be fired except for

cause, that is, misconduct? A. All those employees employed on October 1, 1964, who had two or more years of service are protected employees.

Q. During these years that we have talked about from 1962 to the present time, was there any method under the brotherhood agreement with the railroad by which the brotherhood could insist on the railroad putting a man to work unless he were fully physically qualified to do every type of job included in his work classification? A. No, we have no agreement.

Q. And do you have any method of insisting that the railroad put a man back to work? A. No. No, to the contrary, we have an agreement setting up a board of doctors if we, or if the organization should state that they would go back and the railroad would hold them off. In that case, then we would set up a board of doctors to determine whether he was physically able to go back over the railroad's objection.

The Court: Yes, but the point is even if the doctors said so, the railroad wouldn't be compelled (507) to take him?

The Witness: Under our present agreement, sir, with the board of doctors, the two doctors, our representative and the railroad's representative, get together. If they disagree, sir, then they appoint the third individual whose decision is final and binding.

The Court: All right.

Q. Just one point. If there is no doubt that a man cannot do all of the work required in his job classification then he doesn't even come within that, does he? A. No, sir.

Mr. Meyer: You may cross examine.

Cross Examination by Mr. Gallagher:

Q. The agreement doesn't preclude the parties from meeting on matters of mutual interest, though, does it, sir? A. No, it does not, sir.

Q. In other words, is it theoretically possible that Mr. Grunenthal could approach the railroad and say, "I'd like to work. Would you consider me working if we could work out a deal"? A. It's possible.

(508) Q. I beg your pardon? A. It is possible.

Q. And if in the future Mr. Grunenthal's doctor says to him, "I think now that you are able to do work in the maintenance of way department and I will so certify," if Mr. Grunenthal came to the railroad with such a certification and the railroad refused to acknowledge that certification, could you then ask for a three-man board? A. I'm going to have to I think straighten something out, because to answer the question, I am not hedging, you all realize that as of January 22nd, we do not represent, or 23rd, pardon me—

Q. Don't give an answer other than what you are going to give. A. All right, sorry.

Mr. Gallagher: I think it would just—

The Court: Just answer the question, Mr. Wurpel.

A. Under our agreement that we have on the railroad?

Q. Yes. A. We could, if our doctor, which we had examine Mr. Grunenthal, said he felt he was able to go (509) back and work also, we then could go to the railroad and ask them to appoint a board of doctors or we wanted a board of doctors and they would appoint their doctor, and when they met, if they were undecided, then they would select the third party—third doctor who would make the decision.

Q. And even in the event that you came to the railroad or if the employee came to the railroad and said, "I have a doctor's certificate, I want to go back to work," and the railroad doctor said, "You can't go back to work," and you asked for a three-man board and the railroad said, "I won't take a three-man board," wouldn't the employee still have a remedy to go to the Railroad Adjustment Board? A. We would go to the Long Island-Pennsylvania system, we would have gone to the Long Island-Pennsylvania Rail

Road System Board of Adjustment. We have our own board on the problem.

Q. That's right. In other words, even if the railroad took the position that, "We don't accept your doctor's certificate, we won't take a three-man board under the contract," the employee would still have a right to go through the machinery of the Railway Labor Act, is that correct?

(510) A. That's right.

Q. Is that correct? A. That is correct.

Mr. Gallagher: That is all.

Cross Examination by Mr. Cohalan:

Q. Mr. Wurpel, couldn't Mr. Grunenthal have gone to some other part of the railroad to apply for employment? A. I couldn't answer that.

Q. Outside of his maintenance of way? A. I couldn't answer that.

Q. You have no experience in that? A. Because I have no control over any other department other than the Brotherhood of Maintenance of Way, that is all we represent.

Q. Under your agreement he would have the privilege to go? A. No, not under our agreement.

Q. You have no connection with that? A. No, sir.

Q. No connection at all? A. No.

The Court: All right, Mr. Meyer.

(511) *Re-direct Examination by Mr. Meyer:*

Q. Just to clarify this one thing, before going to the selective board of doctors or through the various other procedures, wouldn't it first be required that the employee's doctor or the brotherhood's doctor certify that he was able to perform all of the duties of his job classification? A. That is exactly right, sir.

* * * * *

CARL F. GRUNENTHAL, the plaintiff herein, recalled as a witness in his own behalf, having been previously duly sworn, testified as follows:

* * * * *

(512) * * *

Direct Examination by Mr. Meyer:

Q. Mr. Grunenthal, coming to this phase of the case, would you tell the jury and the Court what training and education you had? A. I only had three years in high school. And that is all the education I had.

Q. And how old were you when you started to work for the Long Island?

The Court: He already told us. 21, 20?

The Witness: 20.

The Court: Right, I think you didn't know I would remember. You are now 45, right?

The Witness: Right.

Q. Now, during the years that you worked for the railroad what type of jobs did you have? A. Well, just trackman work.

Q. Was it all laboring work? A. Yes, that is trackman, laboring.

Q. And did it require you to be on your feet most of the time? A. Yes.

The Court: May I interrupt? What was your weight when you started—

(513) The Witness: My weight?

The Court: Let's say what was your weight on the day we are concerned with in September of 1962?

The Witness: About 175.

The Court: 175. And you are what, six feet tall?

The Witness: Yes.

The Court: All right, sir.

Q. What was the general condition of your health before this accident? A. Good.

Q. And had you ever had any injury to your feet or to your legs at any time? A. No.

Q. Did you have any difficulty with them? A. No.

Q. At any time? Now, come down back to the point of the injury. We left it when the tie fell on to your right foot and at that time you told us that you were wearing what you called safety shoes. A. Yes, sir.

Q. What sort of shoes are they? A. They are a regular high work shoe with the (514) steel tip that covers the toes.

Q. Now, what happened to your foot? A. The tie fell on—fell on the end of the steel tip right by the toe and in my instep. Then it made a hole right through the foot.

The Court: Demonstrating with his right foot.

Q. Now, did you pass out or were you conscious completely or just what was your condition? A. I guess I must have saw stars. I mean I was more or less dazed.

Q. And then will you just go on and tell the jury and the Court what was done for you then? A. Well, after the accident, the general foreman at that time, Al Casale, helped take my shoe off and when we saw the extent of the accident he ordered a small—

Q. What did he see? A. Well—

Q. What— A. Just blood.

Mr. Gallagher: I object.

The Court: Wait a minute. Counsel is right. He changed the question. What did you see? (515) That stands.

The Witness: All I saw was blood and I couldn't take my stocking off because the blood was sticking right through.

Q. What did they do then? A. They put me in a truck and took me to the hospital.

Q. That was Queens— A. Yes, Queens General Hospital.

Q. And what was done for you there? A. Well, they cut the sock off, I had X-ray treatments and then he put —put the foot in a cast.

Q. And you remained there for a week? A. For a week.

Q. Till the 26th. What was your condition at the time that you were sent from there over to the Brunswick Hospital on the 26th? A. Well, I still had the cast on just like the first day.

Q. All right. And what did you feel? What was the condition of your foot? A. Well, I believe it was very bad. I couldn't—

Q. What—were you in pain? (516) A. Oh, yes.

Q. All right, that is all we really have to know.

What did they do for you at Brunswick on that first occasion? A. Well, they took more X-rays, they cleaned it up and they put a new cast on it, went up to the knee.

Q. And you were there from the 26th until the 1st of October, is that right? A. Yes.

Q. All right. Now, were you still in that cast up to your knee when you were discharged from Brunswick that time? A. Yes.

Q. Now, who took care of you during that time? A. Dr. Prisco.

Q. And he was a hospital doctor, wasn't he? A. No, he's an orthopedic man.

Q. I mean— A. Yes.

Q. —you first met him at the hospital? A. Yes.

(517) Q. You never met him before, he never treated you before? A. No.

Q. You were discharged from the hospital on the 1st of October, 1962.

Then what was done for you before you returned to the hospital again? A. Well, I visited the hospital once a month where they put a—or every two weeks and they put a new cast on it. They looked at the foot, put new dressings and a new cast on.

Q. And so far as you could feel or see did the condition of your foot during that period seem to improve or remain about the same? A. Well, I was on crutches and it felt a little better, it was getting—

Q. All right. You were put back into the Brunswick Hospital on February 1st and you stayed there until February 23rd, 1963.

What was done for you during that time? A. They took the cast off and every day I had a new dressing on the infection I had.

Q. And what did you see? What was the condition of your foot at that time? (518) A. Oh, it was swollen and it was still painful.

Q. Was the cast reapplied before you were discharged that time from the hospital or were you discharged without a cast? A. Without a cast.

Q. Without a cast. And were you after February 23rd, 1963 permitted to go around on crutches again? A. Yes.

Q. All right. Now, between that discharge from the hospital and when you went back again in August of 1963, what was your condition? A. Well, that—I could still walk. I could walk without crutches then. I think a month or two before they took the crutches away from me.

The Court: Do you remember about when that was, Mr. Grunenthal? When did they take the crutches away?

The Witness: Oh, about June.

The Court: June of 1963?

The Witness: June of 1963.

Q. And during this time you were still returning to see Dr. Prisco? (519) A. Yes.

Q. All right. And then what occurred? A. Well, that hole that was in my instep wasn't closing all the way and she was oozing, so this Dr. Prisco put a skin graft. They took it from my thigh and put it down on my foot, on my instep.

Q. Now, you haven't told us about any hole before this time.

When did you first notice that? A. Well, right after they took off the cast in February.

Q. And what was it? Can you tell us what— A. Well, it was the size of a quarter and it was always oozing.

Q. I see. And that is what you went back into the hospital for in August? A. Well, I went back in February for them to see if they could really close it up.

Q. Yes? A. And after I was discharged in February it was still open and it was open right up to August when the time I went into the hospital.

Q. All right. A. For the skin graft.

(520) Q. Now, then, you were back in the hospital from the 30th of August until the 21st of September of 1963? A. That's right.

Q. What did they do for you during that period? A. Well, they was—they always wanted to know if it was taking, if the skin was taking on it and only in one corner the skin was, I see taking, it was—I would say a small hole still open and she was still oozing.

Q. How did that progress while you were in the hospital and what was its condition when you were discharged that time? A. Well, it progressed very slowly.

Q. How was it by the time you were discharged from the hospital? A. Well, the skin only took in one corner.

Q. Now, was anything done for you after your discharge in September of 1963? A. Well, yes, I went back in—

Q. No, I mean— A. Oh, no.

Q. —before, right after you were discharged. A. Well, no, they were just—they just told (521) me to keep it clean and to bathe my foot. Then I was walking pretty good then without crutches or anything and like—

Q. In other words, you were improving pretty well at that time? A. Yes, sir.

Q. All right. Now, what's the next thing that happened as you recall? A. Well, around October Dr. Prisco gave me a note saying that I could go back to work but on light duty, so I brought the note in to the railroad and I gave it to my supervisor and he gave me a desk job up in the Koven freight yard and I stayed there for two weeks.

Q. During that time, what did you do? A. I was making out order blanks for material, different materials.

Q. Now, you didn't have any work to do on your feet at that time? A. No.

Q. And what was the condition of your foot during that period of time as you recall? A. Well, she was swelling up and the doctors wanted that hole to really close up. (522) Q. Was it still open at that time? A. It was still open at that time.

Q. Now, you indicated that you stayed at that job for two weeks. A. Two weeks.

Q. And then what occurred? A. Well, then they decided that I should see a Dr. Urb and they want to give me that sympathec—they call it, I don't know.

Q. Sympathectomy. A. Well, sympathectomy, and then I told the railroad about the operation and then I went and had it done.

Q. Now, you went back into the hospital then on December 10th and stayed until December 17th of 1963, is that right? A. Yes, sir.

Q. Now, was it during that hospitalization that the sympathetcomy was done? A. Yes.

Q. Do you recall what that was? A. Well, I heard the doctor this morning describe it.

Q. All you knew was when you came out you were (523) cut across the side? A. That's right.

Q. What did you personally observe as to how your foot progressed following that operation? A. Very good. I thought so anyway.

Q. And you continued then from December 17th of 1963 until June 10th of 1964 before you went back into the hospital.

What was your condition between that time, the condition of the foot? A. Well, it was all right. I was walking around.

Q. And— A. But that bone spur was giving me trouble when I was walking.

Q. Now, had the pain in the foot subsided, had it gotten better, gotten worse, remained the same during that time? A. About the same.

Q. Tell us about the bone spur, when that started to grow or become uncomfortable and painful, and just what it was. A. Well, before I went to have this operation by Dr. Urb, that spur was there but they had to close (524) the hole up first before they had to operate on it and during the course from the end of that period until June they were just letting that operation do its best.

Q. I see. Now, during that time had what you call the hole in your foot closed up? A. Yes.

Q. And had the scar from the operation healed all right? A. Yes.

Q. So that what was the purpose of your going back into the hospital in June of 1964? A. Well, to have this bone cut off that I could walk better.

Q. And that was— A. And less pain.

Q. And that was operated on at that time? A. That's right, yes.

Q. Now, June 15th of 1964 you were discharged from the hospital after that operation? A. Yes, sir.

Q. And after that period of time did you find that you had less pain or more pain or about the same with your foot? (525) A. Less pain, less pain where the bone spur—

Q. And after a short period of time after the operation you were, I suppose, able to walk again, weren't you? A. Yes.

Q. How were you getting along then as you came down into the fall of 1964? A. All right. I would say all right.

Q. And were you able to walk fairly well? A. Yes, sir.

Q. Were you without pain or were you still having any pain in the foot? A. I always have a pain, it is like a dull toothache, to this day.

Q. Now, then, what occurred in the fall of 1964? A. I went back to the railroad—well, first of all, Dr. Prisco gave me a slip again.

Q. Same sort of a slip? A. Same sort of a light-duty slip that I could go back to work but only on light duty. I went up to the railroad and they refused me a light-duty

job. So then they sent me down to their doctor and he more or less said I couldn't go back to work.

(526) Q. First of all, will you tell us, so far as you can remember, when that was? A. In November of 1963.

Q. 1964? A. Oh, 1964, I'm sorry, 1964.

Q. Since that time have you at any time been given a return-to-duty slip or a qualification for return to work by the railroad? A. No.

Q. Now, since that time—now starting in the fall of 1964 and I would come down to the next couple of years quickly—how has your condition been, has it improved, remained the same, gotten worse? A. I would say remained the same.

Q. During all that period of time, your foot has been approximately the same condition that it is now? A. I think so, yes.

Q. Now, some mention was made about some breaking down of the skin on your foot. Would you tell us about that? A. Yes. Well, right up to last March, my foot—my foot right by my ankle it breaks open, it is like a rash, so I go to this dermatologist and (527) he gives me some salve to put on it and that is all I know about that. I didn't see any reports on that.

Q. This is not because the foot is bumped or anything of that sort? A. Oh, no, no.

Q. Now, of this period of time since the fall of 1964 have you tried to get work elsewhere? A. Yes.

Q. And what efforts have you made to get some sort of a light job that you would be able to do? A. Well, first of all I tried to get a filing job, or—like a filing clerk or something like that, but everybody seems to think I am getting a little too old for it to be in an office now and I have no experience and every—that is what it amounts up to, practically every place I go to.

Q. Now, have you at any time during that period been able to obtain any work? A. Yes.

Q. And where did you obtain some sort of a job? A. Well, for the American Legion in Massapequa. Every—two

days a week, a couple of days a week I (528) work as a custodian.

Q. And when did you first get this custodian's job? A. Well, six months—about a year, I guess.

Q. And you work there two days a week, Mr. Grunenthal. How many hours a day? A. Oh, it varies. It's according to how I feel and everything else.

Q. Well, are you able to make your own hours, Mr. Grunenthal? A. Yes, yes.

Q. And depending on how your foot feels you are able to sit or stand or whatever you want to do, is that right? A. Yes.

Q. What do you get paid? A. $15 for the two days.

Q. That is $7.50 a week?

The Court: $7.50—

Q. $7.50 a day, sorry, your Honor. A. Yes.

Q. Now, the present condition of your foot, Mr. Grunenthal, as you feel it, you indicated you always have a pain like a toothache. How does it affect your (529) walking, if it does in any way? A. Oh, yes, I can't walk down stairs. I have to go down sideways.

Q. And what is the reason for that? A. Well, I can't bend my foot, my toes.

Q. Does it in any way affect you when you are sitting, if you sit for any length of time? A. Yes, it does.

Q. In what way does it affect that? A. It feels like it is going—it is going to burst my shoes open.

Q. What do you do about that? A. I stand up and walk around a bit.

Q. Now, does the weather in any way affect it? A. Yes.

Q. In what way? A. Oh, even the day before, before it rains or snows, any kind of damp weather, inclement weather, I feel it.

Q. Feel it in what way? A. Oh, painful.

Q. That is, a pain different from what you have ordinarily? (530) A. Oh, yes, much different, yes.

Q. What do you do for it? What do you do for the foot? A. I bathe it in salt water and that really does a good —a good job.

Q. Well, can you tell us a little more about that? How frequently do you find that you have to do it and what does it do for you? A. Well, I bathe it every day and it really helps me, say, for about three or four hours.

The Court: Is that pursuant to the doctor's instruction?

The Witness: I don't know—yes, he did tell me to bathe it.

The Court: In salt water?

The Witness: In salt water.

The Court: Hot, or what?

The Witness: No, just lukewarm. In fact, the best water for it is the ocean water.

The Court: When you say "the best," why do you say the best?

The Witness: When I go down to the surf and I let the waves down on it.

The Court: What you mean is—

(531) The Witness: It relieves it.

The Court: You find relief that way?

The Witness: That's right, yes.

The Court: All right.

Q. Now, have you been visiting the doctor over this period of time? A. Yes.

Q. And how frequently have you done that? A. Every six months.

Q. And has he given you any particular type of treatment? A. No.

Q. Just examined it? A. Examined it and just keep on doing what I am doing.

Q. Now, you have indicated, as much as I feel it is necessary for you to, about the pain you have had in the foot. Has that been bearable so far as you are concerned up to the present time? A. Oh, yes. I mean, I just take it for granted now. It doesn't bother me now.

Q. And other than the increased discomfort that you have indicated in bad weather, has this pain (532) up to now become much worse than it was before, or remained about the same? A. Remained about the same.

Q. Has it improved any? A. No, I don't think so.

Q. And you, sir, are now 45 years old, is that correct? A. Yes, sir.

Mr. Meyer: You may cross examine.

Cross examination by Mr. Gallagher:

Q. When was it that you went back to work at the Koven yard desk; was that in 1963, Mr. Grunenthal? A. 1963, yes.

Q. And you left at that time because you had to go back into the hospital, is that correct? A. Yes, sir.

Q. And did I understand correctly that around the time of the fall of 1964 you were able to walk fairly well? A. Yes.

Q. And was it in 1964, then, that you went back to the railroad and asked to be put back to work? (533) A. Yes.

Q. Did you serve any time in the Armed Services, Mr. Grunenthal? A. No, sir.

Q. Did you speak to anyone in particular in the railroad at the time that you went back in 1964 about going back to work? A. Yes.

Q. With whom did you speak? A. Mr. Glick, sir.

Q. And did you discuss any types of jobs that you could hold? A. Yes.

Q. Did any question come up that you couldn't be assigned to particular types of jobs because of seniority problems? A. No.

Q. Did you discuss any situation that you couldn't be put in other kinds of jobs because you had to pick a job? A. I don't recall that.

Q. Well, isn't it a fact, Mr. Grunenthal, that the job that you had on the date that you were hurt was a job that you picked? (534) A. No, sir.

Q. That you bid in for? A. No, sir.

Q. But what was your title on the date that you were injured? A. Foreman.

Q. And how long had you been a foreman? A. A couple of years.

Q. And before you became a foreman, what was your title? A. Trackman.

Q. And a trackman, is that a job that you would have to bid in, based upon seniority? A. Only on—no.

Q. How do they assign the jobs as trackman? A. Well, you have—they have a number of gangs, say ten gangs, and then they say put ten men in a gang.

Q. But once a man gets put in a gang—

Mr. Gallagher; Withdrawn.

Q. In your branch of the railroad, do they use the term "owning the job"? A. Not a trackman.

Q. Do you understand what "owning the job" (535) means? A. That is a foreman, yes.

Q. Well, will you explain to the Court and jury what you understand by the term "owning the job"? A. Say we have ten gangs, every gang is a number and if foreman No. 5 wants to bid in on—if he wants No. 1 gang, he has to have seniority over No. 1 and then he owns that job.

Q. Well, when you came back in the fall of 1964, were there any foreman jobs open? A. I don't recall.

Q. Well, were there any jobs available, or any people in jobs over whom you had seniority?

The Court: Excuse me. I just want to follow this, Mr. Gallagher. You are not contending that when this witness went back in 1964 he was expecting a foreman's job, are you? Was he capable of being able to undertake a foreman's job in 1964?

Mr. Gallagher: I am not sure, your Honor. I am trying to develop why he didn't get back, what was open and what was available. I honestly don't know.

The Court: Can you answer directly? Do (536) you know why they didn't put you on in 1964 any kind of work?

The Witness: No.

The Court: Did they tell you?

The Witness: Well, they told me, the doctors told me, the company doctor told me I couldn't go back to my job.

The Court: Yes, but why? Did he say so?

The Witness: Yes, my foot.

The Court: All right. So it was the doctor for the railroad who said that?

The Witness: That's right, yes.

The Court: All right.

Q. Did you ask the company doctor at that time if there was any other kind of a job that you could fit into? A. I don't recall.

Q. Did you take it up with your brotherhood at that time? A. I tried to get in touch with a Charlie Bell, but he was in the hospital and later on I found out he just died recently. He was in the hospital all that time, so I don't know who was the representative.

(537) Q. You mean you tried to reach somebody in the brotherhood for the purpose of discussing your status about going back to work but you couldn't reach somebody because he was sick? A. That's right.

Q. And you just let it lay there? A. Yes.

Q. You didn't pursue it any further? A. No.

Q. Did you have a lawyer at that time? A. Not at that time. 1964? I don't recall now if I had. I don't know. I don't recall.

Q. So you went back— A. Oh, I believe I did have a lawyer at that time.

Q. Did you take it up with him? A. Yes.

Q. Did he give you any advice one way or the other? A. I don't recall.

Q. Did he urge you to keep looking for the job?

Mr. Meyer: Oh, now, if your Honor please, I must object to that.

(538) The Court: Objection sustained.
Mr. Meyer: The man is not qualified.
The Court: Objection sustained.

Q. Well, after the company doctor told you you couldn't work, did I understand you correctly you took it up with Mr. Glick or Mr. Gluck? A. Yes.

Q. And what did he tell you, if anything? A. Well, he went upstairs and saw somebody upstairs, and I don't know who he saw. Then he came down and told me, "You failed the medical and we can't take you back."

Q. And then you went to look for somebody in the brotherhood, in the union, right? A. Yes.

Q. And you couldn't reach anyone, is that correct? A. That's right.

Q. And then you just let the matter drop? A. Yes, sir.

Mr Meyer: I object to that your Honor. He talked to counsel about it.

The Court: Yes. He said they met and he said yes.

(539) Mr. Cohalan: It is not relevant.

The Court: That is relevant.

Next question.

Q. After that, for instance, in the year 1965, did you go back to the railroad and ask them for your job back? A. No.

Q. In the year 1965, did you try to locate anybody in the brotherhood to assist you? A. No.

Q. Did you talk to your counsel about it? A. I don't know—I don't recall if I did or not.

Q. Did you take any affirmative steps during 1965 to try to get back to work on the railroad?

Mr. Meyer: Now, if your Honor please, I object to this line of questioning because there is absolutely no evidence, there couldn't be any evidence, that he could qualify in any other type of job. Or that he could be put

back on the railroad, even if the railroad wanted him to as long as he wasn't physically qualified.

The Court: Yes. Mr. Meyer, you are now supplying an argument, but that doesn't preclude (540) cross examination. Even if he goes to the veracity of the witness, if that is the sole purpose, I would have to admit it. The jury can put such weight as they think it warrants, but I don't think that excludes it and you might very well argue what your deduction is from the testimony, but I can't exclude the testimony.

Mr. Meyer: I see, your Honor, sure.

The Court: Counsel wants to know, what did you do about this job, trying to get a job in 1965? Why didn't you go back to the railway? You had been there for 25 years. He wants to know why didn't you go back in 1965. What's the truth, what is the answer?

The Witness: Because I was getting a disability pension from the railroad.

The Court: Why didn't you say that?

Mr. Gallagher: Well, now, your Honor, may I approach the bench?

The Court: Come on.

(At the side bar.)

The Court: That is what you were going after all the time.

Mr. Gallagher: No.

(541) The Court: You were leading to it.

Mr. Meyer: Yes, that is why I tried to stop him.

The Court: You kept on hammering away for no good reason at all.

Mr. Gallagher: I know this rule as well as I know my own heart. Do you want—

The Court: I will go in.

Mr. Gallagher: I discussed this this morning, I want to warn you don't bring up—

The Court: Why did you keep on hammering away in 1965? He already told us he was rejected medically in 1964 and you kept on going after him with regard to 1965.

Mr. Gallagher: I didn't.

The Court: Yes, you did, and in fact you produced the argument Mr. Meyer advanced and I figured maybe on the question of veracity I would let you go on, but you kept on being persistent.

Mr. Cohalan: Because he could have gotten a job somewhere else.

Mr. Gallagher: I was frank to admit—

The Court: Off the record.

(Discussion off the record.)

(542) (In open court.)

The Court: All right. Let's proceed.

By Mr. Gallagher:

Q. Is it a fact that in 1964, around the fall, Mr. Grunenthal, that your doctor told you that you were able to perform light duty? A. I believe so.

Q. And exclusive of going back to the railroad, did you look for work elsewhere? A. Yes.

Q. And can you tell the Court and jury the number of places that you went to?

The Court: All right now. Do you understand the question?

The Witness: Yes.

The Court: Now answer it, we don't know, we weren't there. Tell us what you did.

The Witness: Well, during that course of the period I went to about four or five different companies and I tried to get a job. One job was in the stockroom and when they found out I had a bad foot they wouldn't take a chance.

Another place was a salesman's job.

The Court: Do you remember the name?

(543) The Witness: Yes, the White—White's Discount House—store.

The Court: Yes. When did you go there, do you remember?

The Witness: Around Christmas time.

The Court: Of what year?

The Witness: Of 1965.

The Court: All right.

The Witness: And I worked there for about four or five days but I couldn't stand it.

The Court: What kind of job did you do?

The Witness: Salesman's job.

The Court: Salesman, behind the counter?

The Witness: Yes.

The Court: What did you sell?

The Witness: In the toy department.

The Court: Toy department. And you found you couldn't take it because you couldn't stand the pain, is that it?

The Witness: Yes.

The Court: What else?

The Winess: I went to a plaster place over in Farmingdale.

The Court: Do you remember the name?

(544) The Witness: Offhand, no.

The Court: Do you remember when it was?

The Witness: In 1966.

The Court: Last year?

The Witness: Yes, last year.

The Court: Beginning or middle?

The Witness: Oh, right after—in January.

The Court: How long did you stay there?

The Witness: I put in an application there and once they found out I had a bad foot they wouldn't even attempt it.

Then I tried in a delicatessen, working a couple of hours a night. It lasted about a week there. It was too much.

The Court: Do you remember where that was, sir?

The Witness: Yes, in May.

The Court: Of last year?

The Witness: Of last year.

The Court: Do you remember the name of the place?

The Witness: Yes, sir, Park Delicatessen in Massapequa.

(545) The Court: All right. Any other places that you tried?

The Witness: No, but right now I have an application in Grumman's and I didn't hear anything about that.

The Court: Did you put in applications anywhere else?

The Witness: No.

* * * * *

By the Court:

Q. What were the hours you put in on an average before the accident? A. Well, that varied, your Honor. Because of quite a bit of overtime. At least nine hours a day.

(546) Q. At least nine hours a day? A. Yes, for five days.

Q. Five days. A. And of course in any kind of emergency, snowstorms or hurricanes, I mean that is how it is.

* * * * *

Mr. Meyer: If your Honor please, I offer in evidence the defendant's answer to Interrogatory No. 23 in which they state that the earnings of Mr. Grunenthal in 1962 up to the 19th of September were $4,258.87.

I also offer in evidence a certified copy of the United States Life Tables and assume—

The Court: Can you stipulate to that, Mr. Gallagher?

Mr. Gallagher: Yes, sir.

Mr. Cohalan: I stipulate that.

Mr. Meyer: It shows that life expectancy of a white male, 45 years of age, which would be as of today, 27.5 years and a white male of 46 years of age, 26.6 years.

(547) The Court: Yes, sir.

* * * * *

Verdict

(580) (Jury roll called—all present.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We award the plaintiff $305,000.

The Clerk: Members of the jury, listen to your verdict as it stands recorded. You say you award the plaintiff $305,000 and so say you all?

Jurors: Yes.

The Court: Would you like to have the jury polled?

Mr. Gallagher: Yes, your Honor.

The Clerk: Members of the jury, you have heard the verdict as it stands recorded.

(Each juror, upon being asked by the clerk, "Is that your verdict?", answered in the affirmative.)

* * * * *

(583) * * * Mr. Gallagher: If your Honor please, I move to set aside this verdict, again on the question of liability, on the ground that liability finding of the jury was against the weight of evidence, contrary to the evidence and against the law.

On the question of the amount of damages brought in by this jury, I think that the verdict (584) should be set aside. I think it should be set aside as excessive and I think in the light of the nature and extent of the injury in this case, it should be set aside as excessive and as one which is such that should shock the conscience of the Court.

* * * * *

(585) * * * The Court: Mr. Gallagher, I anticipated you, and I think that you would be well advised to make the motion on papers with a memo.

(586) * * * The Court: Sure. You have a right to move on any point in the entire case.

Mr. Gallagher: We also have the problem here, your Honor, as to the liability between railroad and the third-party defendant.

The Court: Which you decided to let the Court determine.

Mr. Gallagher: Yes, sir.

The Court: Now, that, of course, will have to await the outcome of the first step, and that is the claim by the plaintiff against the railway, so let's dispose of that first and then let's go on to the other. That is what I understood you agreed to do.

Is that not right, Mr. Cohalan?

Mr. Cohalan: Yes, your Honor.

Mr. Gallagher: My motion now is merely *pro forma*, your Honor.

The Court: All right. Then you began to cite authorities and began to reach out for cases that you weren't too sure about. I say take your time, file a brief and let's see what it amounts to. Right?

(587) Mr. Gallagher: Yes.

The Court: Mr. Cohalan?

Mr. Cohalan: I would like to join in the motion *pro forma* made by Mr. Gallagher and the privilege of submitting—the permission of the Court to file papers on it. I would just as soon argue it right now.

The Court: Well, I am going to reserve decision, anyway, Mr. Cohalan, and you can give me whatever memoranda you wish, according to the rules of the court.

Mr. Cohalan: Would your Honor give us time for it?

The Court: Surely. Ten days.

Mr. Meyer: Your Honor, I have—

Mr. Cohalan: I think I will be engaged in trial for the next ten days.

The Court: Well—

* * * * *

(687)

Motion of The Long Island Rail Road Company to Set Aside Verdict

(Title Omitted in Printing)

SIRS:

Please Take Notice, that the defendant and Third-Party Plaintiff, The Long Island Rail Road Company, moves this Court before Honorable Irving Ben Cooper at his Chambers, Room 2904 of the United States District Court, Foley Square, Borough of Manhattan, City of New York, on the 14th day of March, 1967, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard for an order setting aside the verdict of the jury rendered on March 2, 1967, in favor of the plaintiff and against the defendant and third-party plaintiff, The Long Island Rail Road Company for the sum of $305,000 and for an order directing judgment in favor of the defendant and third-party plaintiff in accordance with its motion made upon the trial for a directed verdict, or, if the foregoing motions be denied to set aside the verdict for the judgment entered thereon and granting defendant and third-party plaintiff a new trial; that all the grounds and reasons for the foregoing motions are set (688) forth in the affidavit of James T. Gallagher, trial counsel for the defendant and third-party plaintiff.

March 7, 1967

Yours, etc.

GEORGE M. ONKEN

Attorney for Defendant and Third-Party Plaintiff, The Long Island Rail Road Company

* * * * *

(689)

Affidavit of James T. Gallagher, Read in Support of Motion

(Title Omitted in Printing)

State of New York,
County of Queens, ss:

JAMES T. GALLAGHER, being duly sworn, deposes and says: I am trial counsel for the defendant and third-party plaintiff, The Long Island Rail Road Company. I represented the defendant and third-party plaintiff on the trial which commenced on February 21, 1967, before Honorable Irving Ben Cooper and a jury. On March 2, 1967, the jury rendered a verdict in favor of the plaintiff in the sum of $305,000.

At the end of the plaintiff's case, the defendant and third-party plaintiff moved for a directed verdict and for a dismissal of the complaint, which motions were denied by the Court.

Defendant and third-party plaintiff also moved at the end of the entire case for a directed verdict in favor of the defendant and third-party plaintiff which motion was denied.

(690) The defendant and third-party plaintiff now moves, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for the following relief:

(a) For an order directing judgment in favor of the defendant and third-party plaintiff, notwithstanding the verdict of the jury and in accordance with the defendant and third-party plaintiff's motion for a directed verdict made upon the trial.

(b) For an order granting the defendant and third-party plaintiff a new trial upon the grounds:

(1) That the verdict is contrary to law, contrary to the evidence and the weight of the evidence and the said verdict is grossly excessive.

(2) That this Court committed reversible error in failing to declare a mistrial because of the fact that the plaintiff, Carl F. Grunenthal, talked to the witness James Finley while he was still under oath and subject to recall on the stand.

(3) In refusing to admit Finley's prior consistent statement in evidence, after the attorney for the plaintiff offered testimony to impeach him.

* * * * *

Plaintiff's Motion to Amend Complaint

(Title Omitted in Printing)

Motion Under Rule (15) to Amend Complaint.

AND NOW, March 6, 1967, plaintiff moves for the entry of an Order amending the Complaint filed in this action so that the *ad damnum* clause shall read:

"WHEREFORE, plaintiff prays judgment against the defendant in the sumof $305,000 and costs."

IRVING YOUNGER
Attorney for Plaintiff

MEYER, LASCH, HANKIN & POUL
Of Counsel

* * * * *

(742)

Memorandum Decision by Cooper, J., Denying Defendant's Motion to Set Aside Verdict

(Title Omitted in Printing)

(Not Reported)

IRVING BEN COOPER, D. J.:

This cause came on for trial February 21, 1967. By stipulation entered into by all the parties, the issue of liability was first submitted to the jury for determination. By agreement of defendants the claim over was reserved to the Court.

(743) The jury on February 28, 1967 found against the Long Island Rail Road on liability and thereupon announced (by virtue of a similar stipulation) that the railroad was negligent; that proximate cause had been established; and that plaintiff was not contributorily negligent.

The second trial stage (damages) was heard by the same jury which on March 2, 1967 brought in a verdict in plaintiff's favor for $305,000.

Third parties plaintiff and defendant made separate motions (hereinafter dealt with) to set aside the verdict. Each motion is denied.

Plaintiff moves to amend the *ad damnum* clause from a demand of $250,000 to $305,000. Motion granted.

* * * * *

The third-party plaintiff and third-party defendant separately move to set aside the verdict contending:

(744) (1) It is contrary to the weight of the evidence. This motion was denied in open court (Tr. p. 444); in any case there is ample evidence to support a finding that Finley negligently failed to obey plaintiff's signal and that this was the proximate cause of the resultant injury to plaintiff.

(2) The court erred in failing to declare a mistrial when plaintiff talked to Finley in the hall outside the court-

room, and further erred in failing to charge the jury on the impropriety of this conduct. We believe our rulings correct on this matter and adhere to our views as expressed in the transcript at p. 349.

(3) The court erred in refusing to admit into evidence a prior consistent statement (3rd party defendant's exhibit k) to bolster the testimony of the witness Finley. Here too, we are not inclined to alter our earlier ruling (Tr. pp. 346-48).

(4) Third-party defendant contends that the court erred in denying it the right to cross examine the witness Chindamo as to a signed statement of the witness (745) (defendant's exhibit i for identification). We believe correct our ruling at trial (Tr. p. 224). The interests of both defendants with respect to the contents of the statement were identical. Therefore, third-party defendant had no right to cross examine the witness on that score since there was no adverse interest.

* * * * *

The defendants move to set aside the verdict as grossly excessive.

The cases on this subject naturally offer little assistance, for each contains some factor varying in degree or intensity from all the rest. Judge Weinfeld put his finger on it (*Dagnello v. Long Island R. R. Co.*, 193 F. Supp. 552, 554, aff'd 289 F. 2d 797 [2d Cir. 1961]):

> "No useful purpose would be served in collating the various cases, except to emphasize the contrariety of individual views."

(746) We were impressed with the attentiveness of the jury throughout the course of the trial, its outward show of exemplary deportment, the considerable time it devoted to deliberating on both the liability and damage phases of the trial, and so expressed ourselves in open Court before excusing the jury.

Clearly we have no way of knowing the jury's actual evaluation of the various items making up total damages. We can and must indulge, however, in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.

We can appreciate the heavy weight given the total trial record by the jury in plaintiff's favor. Among other impressive phases of the trial were, (a) the candor evinced throughout by plaintiff, the total absence of exaggeration in his testimony especially when describing the excruciating physical pain and mental anguish he endured since the accident (September 19, 1962), his efforts to obtain employment if only to keep his mind off his (747) incessant misery (he had been in the constant employ of the railroad for approximately twenty years and was forty-one at the time of the accident); (b) the unrebutted testimony of plaintiff's medical expert, his explanation of the highly significant entries appearing in the hospital records relating to intensive and extensive medical treatment (including a sympathectomy) undergone by plaintiff, the setting in of gangrene and the measures taken to check its advance, the impending operation to remove part of the foot and the consequent total loss of its use for the only type of work known to plaintiff, coupled with attendant pain of a "fragile" foot in the future—all this testimony was effectively direct and utterly convincing; (c) tantamount to no contest as to each item of damages was the total trial record adduced by plaintiff.

Wages lost for the period between the dates of accident and trial (5½ years) amounted to approximately $27,000. (748) With a life expectancy of approximately 27 years, plaintiff's future wages based on $6,000 per annum would conservatively amount to $150,000; discounted this would be about $100,000. However, convincing testimony not refuted was offered at trial by plaintiff demonstrating the steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood

that similar increases would continue. It might very well follow, therefore, that the wage increases would offset the discount calculation.

* * * * *

Thus the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses.

(749) We calculate the jury in its wisdom saw fit to allow an amount approaching $150,000 for plaintiff's pain and suffering—past and future. On the record here, it had good and sufficient reason to regard and assess it as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery. Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved—especially where clearly unearned or cruelly inflicted. Who is to say this jury was not so composed? If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head—in its reflected resolution to so respond.

Concededly, at first blush the verdict appears excessive. However, a detailed analysis of the proof covering the items making up total damages in the light of this particular trial record, with resounding emphasis in plaintiff's favor all down the line, points to a jury that was generous—not generous to a fault or outside the (750) bounds of legal appropriateness.

We are told, and properly so, that the jury's discretion in the assessment of damages in a case predicated on subject matter such as we deal with here is wide—not wild. Theirs is the responsibility. A judge must not in-

terfere with the jury's verdict unless he conscientiously believes it excessive. *Dagnello v. Long Island R. R. Co., supra; Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F. 2d 733, 735 (2d Cir. 1958). Applying that criterion, we cannot in all good conscience say so.

Each motion addressed to the alleged excessiveness of the verdict is denied.

The jury's verdict remains undisturbed. There being no just reason for delay, let judgment be entered.

This shall be considered an order; settlement thereof is unnecessary.

So ordered:

New York, N. Y.
April 10, 1967

s/ IRVING BEN COOPER
United States District Judge

JUDGMENT

(Title Omitted in Printing)

The issues in the above entitled action having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge and a jury on February 21, 23, 24, 27, 28 and March 1 and 2, 1967 and the parties to the third-party action having agreed that the issues therein be reserved to the Court, and the issues as to liability and damages having been submitted to the jury separately as stipulated to by the parties and on the issue of liability the attached interrogatories having been submitted to the jury, and the jury having answered the interrogatories as indicated thereon, and the jury on the issue of liability having found in favor of the plaintiff, and on the issue of damages the jury having awarded the plaintiff the sum of $305,000.—, and the defendant/third-party plaintiff and the third-party defendant having moved to set aside the jury verdict, as grossly excessive, and the

plaintiff having moved to amend the *ad damnum* clause from a demand of $250,000.— to $305,000.— and the Court having reserved decision on the said motions, and the Court thereafter on April 10, 1967 having handed down its Memorandum Decision denying the defendant/third-party plaintiff and the third-party defendant's motions to set aside the verdict, and granting plaintiff's motion to amend the *ad damnum* clause from a demand of $250,000.— to $305,000.—, and there being no just reason for delay of entry of this Judgment, it is

(752) ORDERED, ADJUDGED AND DECREED: That the plaintiff Carl F. Grunenthal have judgment against the defendand/third-party plaintiff The Long Island Rail Road Company in the amount of $305,000.—

Dated: New York, N. Y.
April 13, 1967

IRVING BEN COOPER
S. S. D. J.

Judgment Entered 4/13/67
John J. Olean, Jr., Clerk

OPINIONS OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(REPORTED 388 F.2d 480)

(Title Omitted in Printing)

Before:

LUMBARD, *Chief Judge*,
MEDINA and HAYS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

The Long Island Rail Road Company appeals from a judgment entered on a jury verdict of $305,000 in a personal injury action under the Federal Employers' Liability Act, 45 U. S. C., Section 51. Remanded for a new trial unless plaintiff agrees to remit the amount of the recovery in excess of $200,000.

MILFORD J. MEYER, Philadelphia, Pennsylvania (Meyer, Lasch, Hankin & Poul, Philadelphia, Pennsylvania, and Irving Younger, New York, N. Y., on the brief), *for plaintiff-respondent.*

JAMES T. GALLAGHER, Jamaica, New York (George M. Onken, Jamaica, New York, on the brief), *for defendant and third party plaintiff-appellant.*

THOMAS F. COHALAN, New York, N. Y. (MacIntyre, Burke, Smith & Curry, New York, N. Y., on the brief), *for third-party defendant-respondent.*

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(481) MEDINA, *Circuit Judge*:

In this FELA action a railroad employee, Carl F. Grunenthal, the acting foreman of a group of men engaged in the removal of a partially buried timber tie on railroad premises in the Queens Village Freight Yard of the Long Island Rail Road, has recovered a verdict of $305,000, the unamended complaint hav- (482) ing sought damages in the sum of $250,000. The Railroad asserted a third-party claim against T. F. Contracting Co., Inc. that had for years furnished a boom truck and its driver for the purpose of moving railroad ties under similar conditions. The issue of liability was tried first and the jury found the negligence of the railroad caused the accident, without any contributory negligence by Grunenthal. The issues as between the railroad

and the Contracting Company were reserved for later decision by the trial judge; and the second phase of the trial before the same jury resulted in a verdict for Grunenthal as above stated. Finally, the trial judge dismissed the third-party claim. On the railroad's appeal from plaintiff's judgment entered on the verdict we find no error in the conduct of the trial but remand for a new trial unless plaintiff agrees to remit the recovery in excess of $200,000, as the verdict is so grossly excessive as to call into play our power to control excessive verdicts. *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961). We affirm the judgment dismissing the third party claim of the Railroad against the Contracting Company. This phase of the case is governed by New York law. *Ratigan v. N. Y. Central R.R.*, 291 F. 2d 548 (2d Cir.) cert. denied 368 U. S. 891 (1961). The undisputed evidence makes it clear that at all relevant times the Railroad had complete control and direction of the driver and operator of the boom truck and of the entire operation of removing the partially buried timber tie. This is enough to settle the issue as between the Railroad and the Contracting Company. *Ramsey v. N. Y. Central R.R.*, 269 N. Y. 219, 199 N. E. 65 (1935); *Irvin v. Klein*, 271 N. Y. 477, 3 N. E. 2d 601 (1936). Moreover, as held by the trial judge, there is nothing in the record to support a finding of a common law or contractual obligation on the part of the Contracting Company to indemnify the Railroad. Accordingly, we shall make no further reference to this phase of the case.

I

In the Queens Village freight yard of the Long Island Rail Road there was a 20 foot embankment below which was an area with parked cars and people moving about. On top of this embankment and a few feet from the edge of the drop there was buried in the ground a 300 pound, 9 foot 6 inch timber tie with approximately 3 feet of the tie sticking out of the ground. The tie had been there for

a long time and it had been used to fasten one end of a chain to protect the edge of the embankment.

On September 19, 1962 Grunenthal, a railroad trackman, as acting foreman had been given instructions by his superiors to remove the timber tie. The group of men under Grunenthal consisted of Michael Chindamo, a helper, and James Finley, the operator of the boom and the truck. Finley and the truck had been used for railroad work, together with railroad employees, on numerous previous occasions, pursuant to an arrangement with the Contracting Company. The three men were accustomed to work together. The customary way to remove an embedded tie was to slack the cable from the boom, fasten a pair of tongs on the projecting part of the tie, take up the slack on the cable until the teeth of the tongs became fastened on to the projecting part of the tie, then raise the tie until it was fully clear of the ground. This was step one of the customary procedure and all the witnesses agree that so far the operation proceeded without any unusual incident. The next step was to lower the cable so the tie could rest flat on the ground and give Grunenthal an opportunity to move the tongs over to the mid-section of the timber tie so that it would balance itself and facilitate the final movement of lifting the tie and placing it on the truck. Grunenthal testified that, after the timber tie was clear of the ground Finley kept lifting it higher instead of lowering it to the ground. As it went higher in disregard of Grunenthal's signal to stop, the unevenly balanced timber tie started to twist about in an eccentric manner and (483) bumped against the side of the truck. As Grunenthal was endeavoring to control the timber tie as it flailed about, the teeth of the tongs lost their grip and the timber tie fell on Grunenthal's foot. The whole operation was necessarily conducted close to the edge of the embankment and whether Grunenthal's efforts to control the tie and to prevent possible injury to those below the embankment did or did not amount to contributory negligence was clearly a question of

fact for the jury. For the same reason we must reject the Railroad's claim of contributory negligence in Grunenthal's failure to give the signal to stop by a movement of his arm at the height of his hip, according to Rule 3405 of the Railroad's Book of Rules. The jury was justified in believing Grunenthal's testimony that taking into account the relative positions of Grunenthal and Finley it was necessary to give the signal chest high to make it visible to Finley.

There was ample proof to sustain the verdict on the subject of liability without taking into account the favored position of plaintiffs in FELA cases. See *Basham v. Pennsylvania R.R.*, 372 U. S. 699 (1963); *Rogers v. Missouri Pacific R.R.*, 352 U. S. 500 (1957); *McCann v. Smith*, 370 F. 2d 323 (2d Cir. 1966).

The Railroad also seeks a reversal, however, on the basis of an incident in a recess period during the trial. This occurred after Grunenthal had given his testimony concerning the falling of the timber tie. Grunenthal, again on the witness stand, said that Finley had come up to him and his wife and told them the accident happened just exactly as Grunenthal had testified. Finley denied he made this statement but admitted he talked with the Grunenthals "about the time we worked together." Finley did not dispute Grunenthal's statement that he was the one who started the conversation. We find nothing improper in Grunenthal's conduct. The motion for a mistrial was properly denied and we approve all the other rulings by the trial judge relative to this trivial occurrence.

A further contention by the Railroad, more or less connected with the incident just described, is that as Finley was impeached by the testimony of the Grunenthals to the effect that he had made a statement contradictory to his testimony on direct examination, it was error to refuse to admit into evidence a written statement by Finley long prior to the trial to the same effect as his testimony on direct examination. There was no error in ruling out the prior consistent statement. This is a perfect example of the

common, garden variety of situation where the general rule excluding prior consistent statements should be applied. Clearly there was no abuse of discretion. Finley's motive at the time he signed the written statement, and at the time he testified on direct examination, and at the time he denied on cross-examination that he told the Grunenthals what they said he told them, was the same, namely to exonerate himself from blame for the accident. If prior consistent statements were received in evidence under these circumstances the basic facts would be buried in the confusion caused by the trial of collateral issues. See *Alexander v. Kramer Bros. Freight Lines, Inc.*, 273 F. 2d 373 (2d Cir. 1959); *Ryan v. United Parcel Service, Inc.*, 205 F. 2d 362 (2d Cir. 1953).

We have examined with care the other points made on behalf of the Railroad and find none worthy of further discussion. Contentions by the Contracting Company are passed over without comment in view of our ruling that the third party claim was properly dismissed.

II

The amount of the verdict is so grossly excessive as to affect the entire case and require a new trial unless Grunenthal agrees within a reasonable time to remit so much of the recovery as exceeds $200,000. We apply the teaching of *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961) and hold that it would be (484) a denial of justice to permit this verdict to stand.

In his enthusiasm for what he described to the jury after the verdict as their fine "spirit" and "dedication" and "with resounding emphasis in plaintiff's favor all down the line" the trial judge, we think, supplied any "absence of exaggeration" in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent.

The complaint demanded a recovery of $250,000. There was no request for an amendment of the *ad damnum* clause

during the trial, no gross amounts or other indications of a possible recovery in excess of $250,000 were expressed in the summation of Grunenthal's counsel or by the trial judge in his instructions to the jury. While the cases in this Circuit indicate that an award in excess of that prayed for in plaintiff's complaint will not necessarily be set aside on that account, *Riggs, Ferris & Geer v. Lillibridge*, 316 F. 2d 60 (2d Cir. 1963); *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720 (2d Cir.) cert. denied, 364 U. S. 824 (1960); *Couto v. United Fruit Co.*, 203 F. 2d 456 (2d Cir. 1953), we think, against the background of the facts of this particular case, the failure to ask for damages in such a large sum as $305,000 is not without some significance.

Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime, from $5600 to $6000 a year.

His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type of work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience including "the effect of his injuries upon the normal pursuits and pleasures of life." This was Grunenthal's due. But, giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello*, where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.

It is futile to attempt a catalogue of instances where under more or less similar circumstances the judges in this Circuit and this Court itself have directed a new trial in personal injury cases unless plaintiff agreed to remit the excess of the recovery over a sum fixed by the judge or by this Court. Each case must stand on its own particular facts.

Affirmed on the dismissal of the third party claim against the Contracting Company. On the appeal of the Railroad from the judgment entered on the verdict of $305,000, the case is remanded to the District Court for a new trial unless plaintiff agrees within thirty days from the filing of this opinion to remit such part of the recovery as exceeds $200,000. If plaintiff accepts the remittitur the judgment in his favor against the Railroad is affirmed.

* * * * *

(485) HAYS, *Circuit Judge* (dissenting in part):

I dissent from the decision to grant defendant a new trial unless plaintiff remits $105,000 of the amount awarded him by the jury.

Plaintiff's evidence as to his injury is uncontradicted. The foreparts of his right foot including the great toe joint and the second metatarsal were crushed and shattered by the 300 pound tie falling from a height of five feet. He was treated in hospitals for more than nine weeks and underwent five serious operations on the foot. He suffered great pain in his foot at all times since the accident and will continue to suffer pain unless the foot is amputated. Because

of the inadequacy of the blood supply resulting from the injury, there is constant danger of infection. Plaintiff cannot now bear weight on the foot nor will the condition of the foot improve in this respect in the future. He is severely limited in the kind of work he can do and clearly will never be able to return to his former employment.

The trial judge, who was surely in a better position to weigh the evidence than we are, referred to "the total absence of exaggeration" in plaintiff's testimony describing "the excruciating physical pain and mental anguish" he has endured since the accident. "On the record here," said the trial judge, "it [the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery." Of the jury's award the trial court said, "We found nothing untoward, inordinate, unreasonable or outrageous —nothing indicative of a runaway jury or one that lost its head."

While I have no doubt that we have the power to order remittitur, we should use that power sparingly indeed. We are not justified in substituting our opinion for the verdict of the jury except in the most extreme case.

> "It is well established, however, that when an appellant seeks a new trial because the verdict was excessive, the grounds for setting aside a denial of such a motion are quite narrow. If the 'action of the trial court * * * [is] not without support in the record * * * its action should not * * * [be] disturbed by the Court of Appeals' Neese v. Southern Ry. Co. [350 U. S. 77 (1955)]. And this Court has held that a new trial should not be ordered unless there has been 'an abuse of discretion' and the verdict 'is so high that it would be a denial of justice to permit it to stand.' Dagnello v. Long Is. R.R. Co., supra, 289 F. 2d at 806. Accord, Diapulse Corp. of America v. Birtcher Corp., 362 F. 2d 736 (2d Cir.) cert. dismissed, 385 U. S. 801, 87

S. Ct. 9, 17 L. Ed. 2d 9 (1966); La France v. New York, N. H. & H. R.R. Co., 292 F. 2d 649, 650 (2d Cir. 1961) (verdict will not be modified unless 'fantastic'); Wooley v. Great Atl. & Pac. Tea Co., 281 F. 2d 78, 80 (3d Cir. 1960) (verdict not to be disturbed unless 'so grossly excessive as to shock the judicial conscience' so that it would be a 'manifest abuse of discretion' not to order a new trial)." *Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (2d Cir. 1967).

Nor is it amiss, in view of the preferred position to which jury verdicts are entitled in cases under the Federal Employers' Liability Act, to point out that in no previous case arising under that Act has our circuit ordered remittitur on the ground of excessiveness of the verdict. In *Dagnello v. Long Island R.R. Co.*, 289 F. 2d 797 (2d Cir. 1961), on which the majority seeks to rely, the court in fact refused to order remittitur and in *Hill v. Long Island R.R. Co.*, 257 F. 2d 736 (2d Cir. 1958), remittitur was ordered because of an ambiguity in the jury's verdict and not because the verdict was excessive.

(486) It is to be hoped that the disregard by the majority in this case for the integrity of the jury's verdict will not be taken by the district courts to justify a widespread increase in the use of remittitur.

IN THE

Supreme Court of the United States

TERM, 1968

No. [redacted]-35

CARL F. GRUNENTHAL,

Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent

and

T. F. CONTRACTING CO. INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 31491

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SUBJECT INDEX

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IN THE

Supreme Court of the United States

TERM, 196

No. ....

CARL F. GRUNENTHAL,

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v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent

and

T. F. CONTRACTING CO. INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 31491

Petitioner, Carl Grunenthal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on January 11, 1968.

OPINIONS BELOW

The opinion and Order of the Court of Appeals remanding upon condition and the dissenting opinion thereto are attached hereto. (App. 9, 16). They are not reported as yet. The opinion of the District Court filed April 10, 1967, is attached hereto (App. 19). It is not reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1968 (App. 15). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 45 U. S. C. 51, 57.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness?

2. Whether a Court of Appeals may order a new trial for excessivenes in an action under the Federal Employers' Liability Act?

3. Wehther the action of the District Court in refusing a new trial in this case is without support in the record?

4. Whether, assuming the power of the Court of Appeals to act in these circumstances, the alternative given by it to the plaintiff of a new trial generally is a proper exercise of such power?

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED

The Federal Employers' Liability Act (45 U.S.C. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier, in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury, or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carirer or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

Petitioner, an employee of the respondent, instituted this action against it under the Federal Employers' Liability Act (45 U.S.C. 51) to recover damages for severe and permanent injuries suffered by him during the course of his employment. By Order of the District Judge, the issues of liability and damages were separately tried before the same jury. The jury rendered its first verdict in favor of petitioner on the liability issue and its second verdict assessing damages in the amount of $305,000.00. The District Court denied respondent's motions for judgment n.o.v. and for a new trial, specifically holding that the verdict was not excessive and should not be disturbed (App. 23).

On appeal, the majority of the panel of the Court of Appeals held that there was no merit in any of the respondent's arguments as to the issue of liability (App. 12), but that the verdict was grossly excessive (App. 14). It remanded the case "to the District Court for a new trial unless plaintiff (petitioner) agrees within thirty days from

the filing of this opinion to remit such part of the recovery as exceeds $200,000.00."

The issues here raised were not involved in the proceedings before the District Court. They were raised in petitioner's (appellee's) brief in the Court of Appeals.

The basis for federal jurisdiction in the District Court was the Federal Employers' Liability Act (45 U.S.C. 51-56).

ARGUMENT

I

Constitutional Limitation and Conflict With the Decisions of This Court

The decision of the Court of Appeals directing a remittitur or new trial because of excessiveness is not within the constitutional power of that Court and is in conflict with the decisions of this Court.

The *Seventh Amendment to the Constitution* provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law".

This Court has not reexamined the question of the application of this provision to the power of the Courts of Appeals in these circumstances since its decision in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474. Until that case was decided and in that decision this Court clearly enunciated the rule that federal appellate courts may not review the action of a trial court in granting or refusing a new trial for error of fact and stated that this rule is applicable where the issue is the inadequacy or excessiveness of the verdict. (Cf. dissenting opinion in *Dimick v. Schiedt*, 293 U.S. 474, 489). It was specifically on the ground that the *Seventh Amendment* interdicted the Court of Appeals' redetermination of facts that this Court decided *Atlantic & Gulf Stevedores v. Ellerman*; 369 U.S. 355.

The Courts of Appeals have unjustifiably assumed that this Court has receded from this position by language which

it used in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 101. In that decision this Court, quoting from an English authority, merely commented that the verdict below was not "monstrous". The rationale of the Courts of Appeals has been that the *Seventh Amendment* does not interdict review of excessiveness if it constitutes an "abuse of discretion" on the part of the District Judge: *Dagnello v. Long Island R. R. Co.*, 289 F. 2d 797; or that the verdict is so grossly excessive that the refusal to disturb it constitutes an error of law: *Complete Auto Transit v. Floyd*, 251 F. 2d 943; or that the verdict is "monstrous": *Solomon Dehydrating Co. v. Guyton*, 294 F. 2d 439. That this view has not been sanctioned by this Court is apparent in its decision in *Neese v. Southern Railway Company*, 350 U.S. 77. There, this Court reversed the Court of Appeals for the Fourth Circuit without reaching the question of whether the appellate power exists under the *Seventh Amendment*.

The decision of the Court below in directing a new trial unless a remittitur is filed for the single reason that the majority of that Court's panel found the verdict "grossly excessive" violates the *Seventh Amendment* and conflicts with this Court's decision in *Fairmount* and its antecedents.

II

Excessiveness of a Verdict Sustained By the Trial Court In a Federal Employers' Liability Act Case Is Not Reviewable

The decision of the Court of Appeals is in conflict with all recent decisions of this Court in actions under the *Federal Employers' Liability Act* (45 U.S.C. 51). This Court has consistently denied the power of the appellate courts to interfere with jury verdicts sustained by trial courts where issues of fact are involved: *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35; *Bailey v. Central Vermont R. Co.*, 319 U.S. 350; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54; *Lavender v. Kurn*, 327 U.S. 645; *Ellis*

v. Union Pacific R. Co., 329 U.S. 649; *Wilkerson v. McCarthy*, 336 U.S. 53; *Stinson v. Atl. C. L. R. Co.*, 355 U.S. 62; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500; *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 109; *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248; *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208; *Harris v. Pennsylvania R.R. Co.*, 361 U.S. 15; *Moore v. Terminal R.R. Ass'n of St. Louis*, 358 U.S. 31.

The amount which should properly be awarded as damages is no less an issue of fact and therefore no less a jury question than negligence: *Rogers v. Missouri Pacific R. Co.*, supra; or employment status: *Baker v. Texas and Pacific Ry. Co.*, 359 U.S. 227; or medical causation: *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U.S. 107; or legal causation: *Gallick v. Baltimore & Ohio R. Co.*, supra; or validity of a release: *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359.

Unless there be found a complete absence of evidence upon which the jury has decided such an action, this Court has consistently reversed every appellate interference with a verdict in a *Federal Employers' Liability Act* case. The District Court here found the jury verdict to be fully supported by the evidence (App. 22) as did the dissenting judge in the Court of Appeals (App. 16). The majority below has substituted its opinion upon this clear question of fact for that of the jury and the trial court.

III

The Verdict Is Supported By the Record and the Opinion Below Is In Conflict With This Court's Most Recent Decision

The most recent decision of this Court which has considered the issue of excessiveness is *Neese v. Southern Railway Company*, supra. There this Court refused to reach and decide the issues above raised, holding that: "Even assuming such appellate power to exist under the Seventh Amendment, we find the Court of Appeals was not

justified, on this record, in regarding the denial of a new trial, upon remittitur of part of the verdict (by the trial court) as an abuse of discretion. For apart from that question, as we view the evidence we think the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The verdict in the instant case is "not without support in the record". The evidence supporting it is extensively reviewed by the District Court (App. 19) and briefly summarized by Hays, C. J., in his dissenting opinion below (App. 16).

The opinion of the majority of the Court of Appeals is in conflict with this Court's decision in *Neese* and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV

The Judgment Below Directing a New Trial In the Absence of Remittitur Is Not a Proper Exercise of the Power to Review, If It Exists

Assuming the appellate power to review for excessiveness and further assuming that the amount of the verdict is "without support in the record" within the principle enunciated in *Neese*, the remand of the action for a new trial in the absence of a remittitur is not a proper exercise of this power.

This action was tried in two parts at the suggestion of the District Judge and with the consent of all counsel under *Federal Rule of Civil Procedure 42(b)*. The issue of liability was completely separated from the issue of damages and separate verdicts were rendered upon each. No error has been found by the Court of Appeals in either trial. Certainly, then, if the verdict as sustained by the District Judge is deemed to be excessive, there is no justification for direct-

ing a retrial of the liability issue as well. The imposition of this condition upon the petitioner's acceptance of the remittitur is onerous and completely unwarranted by the record.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the judgment of the Court of Appeals reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

MILFORD J. MEYER
Attorney for Petitioner

Of Counsel:
IRVING YOUNGER
MEYER, LASCH, HANKIN & POUL

APPENDIX

OPINIONS OF THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Before:

LUMBARD, *Chief Judge*,
MEDINA AND HAYS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

The Long Island Rail Road Company appeals from a judgment entered on a jury verdict of $305,000 in a personal injury action under the Federal Employers' Liability Act, 45 U. S. C., Section 51. Remanded for a new trial unless plaintiff agrees to remit the amount of the recovery in excess of $200,000.

MILFORD J. MEYER, Philadelphia, Pennsylvania (Meyer, Lasch, Hankin & Poul, Philadelphia, Pennsylvania, and Irving Younger, New York, N. Y., on the brief), *for plaintiff-respondent*.

JAMES T. GALLAGHER, Jamaica, New York (George M. Onken, Jamaica, New York, on the brief), *for defendant and third party plaintiff-appellant*.

THOMAS F. COHALAN, New York, N. Y. (MacIntyre, Burke, Smith & Curry, New York, N. Y., on the brief), *for third-party defendant-respondent*.

MEDINA, *Circuit Judge:*

In this FELA action a railroad employee, Carl F. Grunenthal, the acting foreman of a group of men engaged in the removal of a partially burried timber tie on railroad premises in the Queens Village Freight Yard of the Long Island Rail Road, has recovered a verdict of $305,000, the unamended complaint having sought damages in the sum of $250,000. The Railroad asserted a third-party claim against T. F. Contracting Co., Inc. that had for years furnished a boom truck and its driver for the purpose of moving railroad ties under similar conditions. The issue of liability was tried first and the jury found the negligence of the railroad caused the accident, without any contributory negligence by Grunenthal. The issues as between the railroad and the Contracting Company were reserved for later decision by the trial judge; and the second phase of the trial before the same jury resulted in a verdict for Grunenthal as above stated. Finally, the trial judge dismissed the third-party claim. On the railroad's appeal from plaintiff's judgment entered on the verdict we find no error in the conduct of the trial but remand for a new trial unless plaintiff agrees to remit the recovery in excess of $200,000, as the verdict is so grossly excessive as to call into play our power to control excessive verdicts. *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961). We affirm the judgment dismissing the third party claim of the Railroad against the Contracting Company. This phase of the case is governed by New York law. *Ratigan v. N. Y. Central R.R.*, 291 F. 2d 548 (2d Cir.) cert. denied 368 U. S. 891 (1961). The undisputed evidence makes it clear that at all relevant times the Railroad had complete control and direction of the driver and operator of the boom truck and of the entire operation of removing the partially buried timber tie. This is enough to settle the issue as between the Railroad and the Contracting Company. *Ramsey v. N. Y. Central R.R.*, 269 N. Y. 219, 199 N. E. 65 (1935); *Irwin v. Klein*, 271 N. Y. 477, 3 N. E. 2d 601 (1936).

Moreover, as held by the trial judge, there is nothing in the record to support a finding of a common law or contractual obligation on the part of the Contracting Company to indemnify the Railroad. Accordingly, we shall make no further reference to this phase of the case.

I

In the Queens Village freight yard of the Long Island Rail Road there was a 20 foot embankment below which was an area with parked cars and people moving about. On top of this embankment and a few feet from the edge of the drop there was buried in the ground a 300 pound, 9 foot 6 inch timber tie with approximately 3 feet of the tie sticking out of the ground. The tie had been there for a long time and it had been used to fasten one end of a chain to protect the edge of the embankment.

On September 19, 1962 Grunenthal, a railroad trackman, as acting foreman had been given instruction by his superiors to remove the timber tie. The group of men under Grunenthal consisted of Michael Chindamo, a helper, and James Finley, the operator of the boom and the truck. Finley and the truck had been used for railroad work, together with railroad employees, on numerous previous occasions, pursuant to an arrangement with the Contracting Company. The three men were accustomed to work together. The customary way to remove an embedded tie was to slack the cable from the boom, fasten a pair of tongs on the projecting part of the tie, take up the slack on the cable until the teeth of the tongs became fastened on to the projecting part of the tie, then raise the tie until it was fully clear of the ground. This was step one of the customary procedure and all the witnesses agree that so far the operation proceeded without any unusual incident. The next step was to lower the cable so the tie could rest flat on the ground and give Grunenthal an opportunity to move the tongs over to the mid-section of the timber tie so that it would balance itself and facilitate the final movement

of lifting the tie and placing it on the truck. Grunenthal testified that, after the timber tie was clear of the ground Finley kept lifting it higher instead of lowering it to the ground. As it went higher in disregard of Grunenthal's signal to stop, the unevenly balanced timber tie started to twist about in an eccentric manner and bumped against the side of the truck. As Grunenthal was endeavoring to control the timber tie as it flailed about, the teeth of the tongs lost their grip and the timber tie fell on Grunenthal's foot. The whole operation was necessarily conducted close to the edge of the embankment and whether Grunenthal's efforts to control the tie and to prevent possible injury to those below the embankment did or did not amount to contributory negligence was clearly a question of fact for the jury. For the same reason we must reject the Railroad's claim of contributory negligence in Grunenthal's failure to give the signal to stop by a movement of his arm at the height of his hip, according to Rule 3405 of the Railroad's Book of Rules. The jury was justified in believing Grunenthal's testimony that taking into account the relative positions of Grunenthal and Finley it was necessary to give the signal chest high to make it visible to Finley.

There was ample proof to sustain the verdict on the subject of liability without taking into account the favored position of plaintiffs in FELA cases. See *Basham v. Pennsylvania R.R.*, 372 U. S. 699 (1963); *Rogers v. Missouri Pacific R.R.*, 352 U. S. 500 (1957); *McCann v. Smith*, 370 F. 2d 323 (2d Cir. 1966).

The Railroad also seeks a reversal, however, on the basis of an incident in a recess period during the trial. This occurred after Grunenthal had given his testimony concerning the falling of the timber tie. Grunenthal, again on the witness stand, said that Finley had come up to him and his wife and told them the accident happened just exactly as Grunenthal had testified. Finley denied he made this statement but admitted he talked with the Grunenthals

"about the time we worked together." Finley did not dispute Grunenthal's statement that he was the one who started the conversation. We find nothing improper in Grunenthal's conduct. The motion for a mistrial was properly denied and we approve all the other rulings by the trial judge relative to this trivial occurrence.

A further contention by the Railroad, more or less connected with the incident just described, is that as Finley was impeached by the testimony of the Grunenthals to the effect that he had made a statement contradictory to his testimony on direct examination, it was error to refuse to admit into evidence a written statement by Finley long prior to the trial to the same effect as his testimony on direct examination. There was no error in ruling out the prior consistent statement. This is a perfect example of the common, garden variety of situation where the general rule excluding prior consistent statements should be applied. Clearly there was no abuse of discretion. Finley's motive at the time he signed the written statement, and at the time he testified on direct examination, and at the time he denied on cross-examination that he told the Grunenthals what they said he told them, was the same, namely to exonerate himself from blame for the accident. If prior consistent statements were received in evidence under these circumstances the basic facts would be buried in the confusion caused by the trial of collateral issues. See *Alexander v. Kramer Bros. Freight Lines, Inc.*, 273 F. 2d 373 (2d Cir. 1959); *Ryan v. United Parcel Service, Inc.*, 205 F. 2d 362 (2d Cir. 1953).

We have examined with care the other points made on behalf of the Railroad and find none worthy of further discussion. Contentions by the Contracting Company are passed over without comment in view of our ruling that the third party claim was properly dismissed.

II

The amount of the verdict is so grossly excessive as to affect the entire case and require a new trial unless Grunenthal agrees within a reasonable time to remit so much of the recovery as exceeds $200,000. We apply the teaching of *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961) and hold that it would be a denial of justice to permit this verdict to stand.

In his enthusiasm for what he described to the jury after the verdict as their fine "spirit" and "dedication" and "with resounding emphasis in plaintiff's favor all down the line" the trial judge, we think, supplied any "absence of exaggeration" in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent.

The complaint demanded a recovery of $250,000. There was no request for an amendment of the *ad damnum* clause during the trial, no gross amounts or other indications of a possible recovery in excess of $250,000 were expressed in the summation of Grunenthal's counsel or by the trial judge in his instructions to the jury. While the cases in this Circuit indicate that an award in excess of that prayed for in plaintiff's complaint will not necessarily be set aside on that account, *Riggs, Ferris & Geer v. Lillibridge*, 316 F. 2d 60 (2d Cir. 1963); *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720 (2d Cir.) cert. denied 364 U. S. 824 (1960); *Couto v. United Fruit Co.*, 203 F. 2d 456 (2d Cir. 1953), we think, against the background of the facts of this particular case, the failure to ask for damages in such a large sum as $305,000 is not without some significance.

Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime, from $5600 to $6000 a year.

His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience including "the effect of his injuries upon the normal pursuits and pleasures of life." This was Grunenthal's due. But, giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello*, where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.

It is futile to attempt a catalogue of instances where under more or less similar circumstances the judges in this Circuit and this Court itself have directed a new trial in personal injury cases unless plaintiff agreed to remit the excess of the recovery over a sum fixed by the judge or by this Court. Each case must stand on its own particular facts.

Affirmed on the dismissal of the third party claim against the Contracting Company. On the appeal of the Railroad from the judgment entered on the verdict of

$305,000, the case is remanded to the District Court for a new trial unless plaintiff agrees within thirty days from the filing of this opinion to remit such part of the recovery as exceeds $200,000.

HAYS, *Circuit Judge* (dissenting in part):

I dissent from the decision to grant defendant a new trial unless plaintiff remits $105,000 of the amount awarded him by the jury.

Plaintiff's evidence as to his injury is uncontradicted. The foreparts of his right foot including the great toe joint and the second metatarsal were crushed and shattered by the 300 pound tie falling from a height of five feet. He was treated in hospitals for more than nine weeks and underwent five serious operations on the foot. He suffered great pain in his foot at all times since the accident and will continue to suffer pain unless the foot is amputated. Because of the inadequacy of the blood supply resulting from the injury, there is constant danger of infection. Plaintiff cannot now bear weight on the foot nor will the condition of the foot improve in this respect in the future. He is severely limited in the kind of work he can do and clearly will never be able to return to his former employment.

The trial judge, who was surely in a better position to weigh the evidence than we are, referred to "the total absence of exaggeration" in plaintiff's testimony describing "the excruciating physical pain and mental anguish" he has endured since the accident. "On the record here," said the trial judge, "it [the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery." Of the jury's award the trial court said, "We found nothing untoward, inordinate, unreasonable or outrageous

—nothing indicative of a runaway jury or one that lost its head."

While I have no doubt that we have the power to order remittitur, we should use that power sparingly indeed. We are not justified in substituting our opinion for the verdict of the jury except in the most extreme case.

> "It is well established, however, that when an appellant seeks a new trial because the verdict was excessive, the grounds for setting aside a denial of such a motion are quite narrow. If the 'action of the trial court * * * [is] not without support in the record * * * its action should not * * * [be] disturbed by the Court of Appeals.' Neese v. Southern Ry. Co. [350 U. S. 77 (1955)]. And this Court has held that a new trial should not be ordered unless there has been 'an abuse of discretion' and the verdict 'is so high that it would be a denial of justice to permit it to stand.' Dagnello v. Long Is. R.R. Co., supra, 289 F. 2d at 806. Accord, Diapulse Corp. of Ameirca v. Birtcher Corp., 362 F. 2d 736 (2d Cir.) cert. dismissed, 385 U. S. 801, 87 S. Ct. 9, 17 L. Ed. 2d 9 (1966); La France v. New York, N. H. & H. R.R. Co., 292 F. 2d 649, 650 (2d Cir. 1961) (verdict will not be modified unless 'fantastic'); Wooley v. Great Atl. & Pac. Tea Co., 281 F. 2d 78, 80 (3d Cir. 1960) (verdict not to be disturbed unless 'so grossly excessive as to shock the judicial conscience' so that it would be a 'manifest abuse of discretion' not to order a new trial)." *Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (2d Cir. 1967).

Nor is it amiss, in view of the preferred position to which jury verdicts are entitled in cases under the Federal Employers' Liability Act, to point out that in no previous case arising under that Act has our circuit ordered remittitur on the ground of excessiveness of the verdict. In *Dagnello v. Long Island R.R. Co.*, 289 F. 2d 797 (2d Cir. 1961), on which the majority seeks to rely, the court in fact

refused to order remittitur and in *Hill v. Long Island R.R. Co.*, 257 F. 2d 736 (2d Cir. 1958), remittitur was ordered because of an ambiguity in the jury's verdict and not because the verdict was excessive.

It is to be hoped that the disregard by the majority in this case for the integrity of the jury's verdict will not be taken by the district courts to justify a widespread increase in the use of remittitur.

OPINION OF THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Opinion of IRVING BEN COOPER, D. J.

This cause came on for trial February 21, 1967. By stipulation entered into by all the parties, the issue of liability was first submitted to the jury for determination. By agreement of defendants the claim over was reserved to the Court.

The jury on February 28, 1967 found against the Long Island Rail Road on liability and thereupon announced (by virtue of a similar stipulation) that the railroad was negligent; that proximate cause had been established; and that plaintiff was not contributorily negligent.

The second trial stage (damages) was heard by the same jury which on March 2, 1967 brought in a verdict in plaintiff's favor for $305,000.

Third parties plaintiff and defendant made separate motions (hereinafter dealt with) to set aside the verdict. Each motion is denied.

Plaintiff moves to amend the *ad damnum* clause from a demand of $250,000 to $305,000. Motion granted.

* * *

The third party plaintiff and third party defendant separately move to set aside the verdict contending:

(1) It is contrary to the weight of the evidence. This motion was denied in open court (Tr. p. 444); in any case there is ample evidence to support a finding that Finley negligently failed to obey plaintiff's signal and that this was the proximate cause of the resultant injury to plaintiff.

(2) The court erred in failing to declare a mistrial when plaintiff talked to Finley in the hall outside the

courtroom, and further erred in failing to charge the jury on the impropriety of this conduct. We believe our rulings correct on this matter and adhere to our views as expressed in the transcript at p. 349.

(3) The court erred in refusing to admit into evidence a prior consistent statement (3d party defendant's exhibit k) to bolster the testimony of the witness Finley. Here too, we are not inclined to alter our earlier ruling. (Tr. pp. 346-48).

(4) Third party defendant contends that the court erred in denying it the right to cross-examine the witness Chindamo as to a signed statement of the witness (defendant's exhibit i for identification). We believe correct our ruling at trial (Tr. p. 224). The interests of both defendants with respect to the contents of the statement were identical. Therefore, third party defendant had no right to cross examine the witness on that score since there was no adverse interest.

* * *

The defendants move to set aside the verdict as grossly excessive.

The cases on this subject naturally offer little assistance, for each contains some factor varying in degree or intensity from all the rest. Judge Weinfeld put his finger on it (*Dagnello v. Long Island R.R. Co.*, 193 F. Supp. 552, 554, *aff'd* 289 F.2d 797 (2d Cir. 1961)):

> "No useful purpose would be served in collating the various cases, except to emphasize the contrariety of individual views."

We were impressed with the attentiveness of the jury throughout the course of the trial, its outward show of exemplary deportment, the considerable time it devoted to deliberating on both the liability and damage phases of the trial, and so expressed ourselves in open Court before excusing the jury.

Clearly we have no way of knowing the jury's actual evaluation of the various items making up total damages. We can and must indulge, however, in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.

We can appreciate the heavy weight given the total trial record by the jury in plaintiff's favor. Among other impressive phases of the trial were, (a) the candor evinced throughout by plaintiff, the total absence of exaggeration in his testimony especially when describing the excruciating physical pain and mental anguish he endured since the accident (September 19, 1962), his efforts to obtain employment if only to keep his mind off his incessant misery (he had been in the constant employ of the railroad for approximately twenty years and was forty-one at the time of the accident); (b) the unrebutted testimony of plaintiff's medical expert, his explanation of the highly significant entries appearing in the hospital records relating to intensive and extensive medical treatment (including a sympathectomy) undergone by plaintiff, the setting in of gangrene and the measures taken to check its advance, the impending operation to remove part of the foot and the consequent total loss of its use for the only type of work known to plaintiff, coupled with attendant pain of a "fragile" foot in the future—all this testimony was effectively direct and utterly convincing; (c) tantamount to no contest as to each item of damages was the total trial record adduced by plaintiff.

Wages lost for the period between the dates of accident and trial (5½ years) amounted to approximately $27,000.

With a life expectancy of approximately 27 years, plaintiff's future wages based on $6,000 per annum would conservatively amount to $150,000; discounted this would be about $100,000. However, convincing testimony not refuted was offered at trial by plaintiff demonstrating the

steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood that similar increases would continue. It might very well follow, therefore, that the wage increases would offset the discount calculation.

* * *

Thus the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted in toto its full significance and drawn such normal and natural inferences therefrom as the law endorses.

We calculate the jury in its wisdom saw fit to allow an amount approaching $150,000. for plaintiff's pain and suffering—past and future. On the record here, it had good and sufficient reason to regard and assess it as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery. Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved—especially where clearly unearned or cruelly inflicted. Who is to say this jury was not so composed? If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head—in its reflected resolution to so respond.

Concededly, at first blush the verdict appears excessive. However, a detailed analysis of the proof covering the items making up total damages in the light of this particular trial record, with resounding emphasis in plaintiff's favor all down the line, points to a jury that was generous—not generous to a fault or outside the bounds of legal appropriateness.

We are told, and properly so, that the jury's discretion in the assessment of damages in a case predicated on subject matter such as we deal with here is wide—not wild. Theirs is the responsibility. A judge must not interfere with the jury's verdict unless he conscientiously believes it excessive.

Dagnello v. Long Island R.R. Co., supra; Dellaripa v. New York, New Haven & Hartford R. Co., 257 F.2d 733, 735 (2d Cir. 1958). Applying that criterion, we cannot in all good conscience say so.

Each motion addressed to the alleged excessiveness of the verdict is denied.

The jury's verdict remains undisturbed. There being no just reason for delay, let judgment be entered.

This shall be considered an order; settlement thereof is unnnecessary.

SO ORDERED:

New York, N. Y.
April 10, 1967

/s/ IRVING BEN COOPER
UNITED STATES DISTRICT JUDGE

No. 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARL F. GRUNENTHAL, *Petitioner*

v.

THE LONG ISLAND RAIL ROAD COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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April 1968

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OCTOBER TERM, 1967

No. 1172

CARL F. GRUNENTHAL, *Petitioner*

v.

THE LONG ISLAND RAIL ROAD COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is printed at pages 9-18 of the petition. It is reported at 388 F.2d 480. The opinion of the United States District Court for the Southern District of New York, which is printed at pages 19-23 of the petition, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1968. The petition for certiorari was filed on February 28, 1968. The respondent was granted an extension of time until April 29, 1968 in which to file this brief. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does the Seventh Amendment preclude an appellate court from reversing a trial judge who abuses his discretion by refusing to order a new trial or remittitur of excessive damages?

(2) If not, does the Federal Employers' Liability Act, 45 U.S.C. § 51, restrict such appellate court action in cases brought under the Act?

(3) On the facts of this case, did the court below err in deciding that there was no rational manner consistent with the evidence by which it could arrive at an award in excess of $200,000 for the plaintiff?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Constitution of the United States and Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, are set forth at pages 2-3 of the petition.

STATEMENT

The petitioner filed a complaint under the Federal Employers' Liability Act (hereinafter FELA) to recover $250,000 damages for personal injuries allegedly sustained in the course of his employment.

Trial was to a jury, but by stipulation the liability and damage issues were tried separately. The jury found against the respondent on the question of liability and subsequently returned a damage award of $305,000.

Following these verdicts, the respondent moved for a directed verdict or, in the alternative, for a new trial on the issue of liability. The respondent also attacked the jury's verdict on damages, contending that it was excessive and required a new trial or the acceptance by the petitioner of a remittitur. Both motions were denied, and judgment was entered on the verdict after the petitioner was allowed to amend his claim for damages from $250,000 to $305,000 to comprehend the jury's award.

The respondent appealed to the Court of Appeals for the Second Circuit upon the ground that the verdict was grossly excessive.[1] The Court of Appeals announced that it would apply its previously established standard in dealing with this claim. Thus, after "giving [the petitioner] the benefit of every doubt" it held that it could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000" as compensation for the petitioner's injuries. Accordingly, the Court of Appeals ordered that the petitioner be given the option of remitting the part of his verdict that exceeded $200,000 or taking a new trial. The petitioner seeks review of this ruling.

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[1] The respondent raised other points for review which, having been decided against it by the Court of Appeals, the respondent no longer presses.

ARGUMENT

I

The petitioner's first two questions relate solely to the power of appellate courts, not trial courts, to order new trials or remittiturs.[2] He argues first that the Seventh Amendment prohibits federal appellate court review of a district judge's denial of a motion for a new trial based upon the excessiveness of a jury's verdict.

The Second Circuit's decision that it had power to reverse the District Court's denial of the respondent's motion for a new trial or remittitur finds direct support in the decisions of all eleven federal courts of appeals. And, contrary to the petitioner's contention, the exercise of this power is not inconsistent with any prior decisions of this Court.

In holding that the petitioner's verdict was excessive, the Court of Appeals stated that it was applying "the teaching of *Dagnello* v. *Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961)." After an extensive analysis of the problem of appellate review of jury verdicts, the court in *Dagnello* announced the following standard:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is

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[2] The petitioner does not suggest that there is any lack of power generally in the federal courts to employ remittiturs to reduce a jury's verdict. The authority in this Court alone precludes him from making any such suggestion. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160; Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66; Neese v. Southern Ry., 350 U.S. 77; Affolder v. New York, C.&St.L.R.R., 339 U.S. 96; Dimick v. Schiedt, 293 U.S. 474, 484-85; Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75; Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47. See also Blunt v. Little, Fed. Cas. No. 1,578 (C.C.D. Mass. 1822) (Story, Circuit Justice).

> close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." 289 F.2d at 806.

Thus, in the instant case the Court of Appeals reversed the District Judge solely because his refusal to order a new trial or remittitur of the jury's verdict constituted an abuse of discretion.

All of the other federal circuits have affirmed their power to review a trial judge's refusal to order a remittitur or new trial when the jury has returned an excessive verdict, and they have applied a standard like that used by the Second Circuit in exercising this power. *See Boyle* v. *Bond,* 187 F.2d 362 (D.C. Cir. 1951); *Compania Trasatlantica Espanola, S.A.* v. *Melendez Torres,* 358 F.2d 209 (1st Cir. 1966); *Russell* v. *Monongahela Ry.,* 262 F.2d 349, 352 (3d Cir. 1958); *Virginian Ry.* v. *Armentrout,* 166 F.2d 400 (4th Cir. 1948); *Glazer* v. *Glazer,* 374 F.2d 390 (5th Cir. 1967), *cert. denied,* 389 U.S. 831; *Gault* v. *Poor Sisters of St. Frances,* 375 F.2d 539, 547-48 (6th Cir. 1967); *Bucher* v. *Krause,* 200 F.2d 576, 586-87 (7th Cir. 1952), *cert. denied,* 345 U.S. 997; *Bankers Life & Cas. Co.* v. *Kirtley,* 307 F.2d 418 (8th Cir. 1962); *Covey Gas & Oil Co.*

v. *Checketts*, 187 F.2d 561 (9th Cir. 1951); *Barnes* v. *Smith*, 305 F.2d 226, 228 (10th Cir. 1962).[3]

The petitioner does not even by implication dispute this unanimity in the courts of appeals, nor does he advance arguments based upon judicial policy or practice in support of his contention. Instead, he argues only that the "Courts of Appeals have unjustifiably assumed that this Court has receded from" its interpretation of the Seventh Amendment as set forth in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474.[4] But this Court did not rest its decision in *Fairmount* upon the Seventh Amendment. It noted:

> "Sometimes the rule has been rested on . . . the Seventh Amendment. . . . More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." 287 U.S. at 482.

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[3] It has also been held that an appellate court may reverse a district judge for wrongfully compelling a plaintiff either to enter a remittitur or face a new trial. Steinberg v. Indemnity Ins. Co., 364 F.2d 266 (5th Cir. 1966).

[4] Petitioner also cites Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, and Neese v. Southern Ry., *supra*. *Ellerman* merely held that on the facts presented it was error for the court of appeals to direct a verdict in opposition to that found by the jury. It did not hold a court of appeals may never award a judgment notwithstanding the verdict. *See* Neely v. Eby Const. Co., 386 U.S. 317. In *Neese* this Court assumed *arguendo* the existence of the power here in question. Such a decision hardly supports the petitioner's statement that *Neese* demonstrates that the unanimous view of the courts of appeals "has not been sanctioned by this Court."

Moreover, the power of a court of appeals to reverse a trial judge for an abuse of discretion was expressly left open in the *Fairmount* case:

> "It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. *The Court of Appeals has not declared that the trial judge abused his discretion.* . . . Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion *we have no occasion to determine.*" 287 U.S. at 485 (emphasis supplied.)

Thus, the Court clearly did not hold in *Fairmount* that the Seventh Amendment or anything else absolutely barred enquiry into the trial judge's action.[5]

A decision of this Court rendered last term further illuminates the insubstantial nature of the petitioner's claim that the action of the Court of Appeals denied the petitioner his rights under the Seventh Amendment. In *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 322, the Court announced, "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does. . . ." It follows that the Seventh Amendment does not distinguish between the power of trial and appellate courts with regard to questions of law. The Court of Appeals' determination in the present case was a ruling on "a question of law." *Dagnello* v. *Long Is. R.R.*, *supra* at 806. *See also Sunray Oil Corp.* v.

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[5] Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, is distinguishable on another ground. The court of appeals was reversed in *Fairmount* for employing an additur to increase the jury's verdict. Additurs were subsequently declared unconstitutional in Dimick v. Schiedt, *supra*.

Allbritton, 188 F.2d 751 (5th Cir. 1951) (concurring opinion). Thus, as in *Neely*, the petitioner's Seventh Amendment argument should be rejected.

II

In his next argument, the petitioner lays aside general principles of law and argues that an appellate court may not "interfere" with a jury's verdict on damages in cases brought under the FELA. None of the cases that the petitioner then cites, however, involved the power of an appellate court to order a remittitur; in each of the cases the question was whether a court had properly directed a verdict in favor of the defendant-employer. And this Court in deciding these cases did not lay down any distinction between trial and appellate courts.

In the present case, the Court of Appeals did not direct a verdict on damages; it held that absent a remittitur the petitioner would have to face a new trial before another jury. Moreover, the petitioner does not contend that the District Judge lacked power under the FELA to order a remittitur.[6] Thus, the cases cited

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[6] The continuous course of practice under the Act compels the petitioner's concession on this point. In Union Pac. R.R. v. Hadley, 246 U.S. 330, 334, this Court, in reviewing an FELA case in which both the trial judge and the appellate court had required remittiturs, unanimously held that, "the Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high." *See also* Munson v. Long Is. R.R., 191 F. Supp. 748 (E.D.N.Y. 1961); Flusk v. Erie R.R., 110 F. Supp. 118 (D. N.J. 1953); Helsel v. Pennsylvania R.R., 84 F. Supp. 296 (E.D.N.Y. 1949); Fornwalt v. Reading Co., 79 F. Supp. 921 (E.D. Pa. 1948); Cunningham v. Pennsylvania R.R., 55 F. Supp. 1012 (E.D.N.Y. 1944); Jennings v. Chicago, R.I.&P. Ry., 43 F.2d 397 (D. Minn. 1930); Hammond v. Pennsylvania R.R., 15 F.2d 66 (W.D.N.Y. 1926), *aff'd*, 18 F.2d 1020 (2d Cir. 1927).

by the petitioner are distinguishable on two grounds: Those cases do not deal with the authority to order a remittitur, and they do not differentiate between trial and appellate court power.

The petitioner's cases, therefore, do not support the argument that the FELA imposes special limitations upon appellate power. Moreover, it is clear "that the system of judicial supervision still exists in [FELA] . . . as in other types of cases." *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). The courts of appeal apply precisely the same standard in reviewing jury damage awards in FELA actions as they apply in other civil actions generally. *See Boston & Maine R.R.* v. *Talbert*, 360 F.2d 286 (1st Cir. 1966); *Russell* v. *Monongahela Ry., supra; Thomas* v. *Conemaugh & B.L.R.R.*, 234 F.2d 429 (3d Cir. 1956); *Atlantic Coast Line R.R.* v. *Anderson*, 267 F.2d 329, 333 (5th Cir. 1959), *cert. denied*, 361 U.S. 841; *St. Louis S. Ry.* v. *Ferguson*, 182 F.2d 949, 954-56 (8th Cir. 1950); *Chicago. R.I.&P. Ry.* v. *Kifer*, 216 F.2d 753, 756-57 (10th Cir. 1954), *cert. denied*, 348 U.S. 917.

State appellate courts deciding FELA cases often order new trials or remittiturs of excessive verdicts. *Pitrowski* v. *New York, C.&St.L.R.R.*, 6 Ill. App. 2d 495, 128 N.E.2d 577 (1955); *Thompson* v. *Jason*, 265 S.W.2d 920 (Tex. Civ. App. 1954); *Louisville & N.R.R.* v. *Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944); *Sibert* v. *Litchfield & M. Ry.*, 159 S.W.2d 612 (Mo. 1942).

The authority is therefore clear that the FELA contains no special rule requiring appellate courts to distinguish FELA actions from all other civil cases with respect to their power to review a trial judge's

denial of a new trial motion based upon the excessiveness of the jury's verdict.

III

The petitioner's next argument is that "the verdict in the instant case is 'not without support in the record.'" Such an argument, of course, raises only a question of fact, and does not justify the petitioner's request for a writ of certiorari. Moreover, a brief review of the facts as stated by the lower courts reveals the correctness of the decision below.

At the time of the trial the petitioner was forty-five years old. He had worked for the railroad during his entire mature life and had received, including overtime, between $5,600 and $6,000 a year. While his right foot was severely injured, its removal has not been necessary, and he is not totally disabled. The petitioner himself testified at the trial that he has been engaged in part-time work as a custodian.

The District Judge admitted that the present discounted value of petitioner's future wages based upon a $6,000 salary would be about $100,000. Thus, even assuming, contrary to the petitioner's own testimony, that he was completely disabled from further employment, there remained a $205,000 excess, explainable for the most part by the jury's award of damages for pain and suffering. This is an extraordinary award for pain and suffering in an action not involving the loss of a limb or other more serious injury, and it justifies the Court of Appeals' judgment that the verdict was "grossly excessive" and not "in any rational manner consistent with the evidence." Indeed, the petitioner in his *ad damunum* clause asked initially for only $250,000.

Thus, even were the Court to reexamine the facts of this case, contrary to its usual practice under the writ of certiorari, it would find that the judgment of the Court of Appeals is fully supported by the record.

IV

The petitioner argues that it was error to order a retrial of the liability issue, as well as the damage issue, as an alternative to a remittitur. This contention, raised for the first time in this Court, plays upon what is at the most an ambiguity in the opinion of the Court of Appeals.

The petitioner did not argue below that the respondent was seeking two new trials, one on liability, the other on damages, merely because damages were excessive. Were the petitioner truly concerned about this issue, he would have raised the matter below in his brief on the merits or later in a motion for clarification of the Court of Appeals' opinion.[7] His failure to do so should not be relieved by a writ of certiorari. *Cf. Lawn* v. *United States,* 355 U.S. 339, 362 n. 32.

The respondent interprets the mandate below as requiring only a new trial on damages in the event that the petitioner refuses the remittitur. Thus, on the remand to the District Court that would follow a denial of certiorari both the petitioner and the respondent would urge the same construction of the Court of Appeals' mandate. There is accordingly no issue arising out of the construction of this mandate.

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[7] It is noteworthy that the dissenting judge below did not protest on this point. Had he agreed with the petitioner's characterization of the court's action, it is unlikely he would have remained silent.

CONCLUSION

The decision below is consistent with the authority of this and all other federal courts. The petitioner's contention that either the Seventh Amendment or the FELA bars appellate review is totally without support. His other contentions, which turn upon an investigation of the record and upon an interpretation of the mandate of the Court of Appeals, are without merit and do not in any case justify the issuance of a writ of certiorari. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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April 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 35

CARL F. GRUNENTHAL,
Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,
Respondent

PETITIONER'S BRIEF ON THE MERITS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1172

CARL F. GRUNENTHAL,
Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,
Respondent

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals remanding upon condition and the dissenting opinion thereto are attached hereto (A. 59, 66). They are reported at 388 F. 2d 480, 485. The opinion of the District Court is attached hereto (A. 54). It is not reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1968 (App. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 45 U.S.C. 51, 57. Certiorari was granted by this Court on May 6, 1968.

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED

The Federal Employers' Liability Act (45 U.S.C. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier, in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury, or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

QUESTIONS PRESENTED

I. Whether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness?

II. Whether a Court of Appeals may order a new trial in an action under the Federal Emloyers' Liability Act solely on the ground that the verdict is "grossly excessive"?

III. Whether the action of the District Court in refusing a new trial in this case is without support in the record?

IV. Whether, assuming the power of the Court of Appeals to act in these circumstances, the granting of a new trial generally in the absence of a remittitur is a proper exercise of such power?

STATEMENT OF THE CASE

Petitioner, an employee of the respondent, instituted this action against it under the Federal Employers' Liability Act (45 U.S.C. 51), to recover damages for severe and permanent injuries suffered by him during the course of his employment. By Order of the District Judge, the issues of liability and damages were separately tried before the same jury (A. 3). The jury rendered its first verdict in favor of petitioner on the liability issue (A. 3).

At the second trial petitioner proved that he had sustained severe injury to his right foot which has required five hospitalizations (A. 6-11), two operations on the foot (A. 11, 14) and a sympathectomy (A. 8). As a result he has been totally and will be permanently disabled (A. 38-43) and has suffered and will continue to suffer great pain (A. 36, 39). Petitioner's testimony at the second trial was uncontroverted. The jury, by its second verdict, assessed damages at $305,000 (A. 49).

Respondent moved for a new trial on various grounds including that the verdict was excessive (A. 41). Its motion was denied (A. 58). Respondent appealed from the judgment entered on the verdict (A. 1). The panel of the Court of Appeals which heard the case divided: Medina, C.J. wrote the opinion for the court (A. 60); Hays, C.J. wrote the dissenting opinion (A. 66).

The majority held that there was no merit in any of the respondent's arguments as to trial errors (A. 61, 63) but that the verdict was excessive (A. 61, 64) and remanded for a new trial unless petitioner agreed to remit all of the verdict in excess of $200,000 (A. 66). Judge Hays held that the court was substituting its opinion for the verdict of the jury (A. 67). Petitioner sought certiorari, which was granted May 6, 1968.

SUMMARY OF ARGUMENT

I. The Seventh Amendment forbids the reexamination of facts tried by a jury except according to the rules of the common law. This Court has consistently held that appellate courts in the Federal system are thereby prohibited from reviewing any factual issue, including the quantum of a verdict, if it has been decided by a jury and sustained by the trial court. The Courts of Appeals have departed from this principle and assumed the power to review jury verdicts which they feel are excessive. They have justified their action by (a) declaring that the common law permitted appellate review, (b) stating that they were not reviewing the fact found by the jury but deciding a question of law as to whether the trial judge had abused his discretion in failing to set aside the jury verdict, or (c) concluding that reinterpretation of the Amendment was needed because of the growth of modern court procedures. None of these reasons justify the overruling of all prior decisions of this Court.

II. The preservation of a jury verdict is an integral part of the right given the railroad worker by the Federal Employers' Liability Act. This Court has firmly established that the extent of appellate review is limited entirely to a determination of whether there is any evidence whatsoever to support the verdict. The principle is not, and cannot be, different in reviewing the quantum of a verdict. The action of the court below, in interfering on the basis that the verdict is excessive, is beyond its power.

III. The verdict in the case at bar is not without support in the record. In fact, an examination of the uncontradicted testimony fully supports it. Both the trial judge, who saw and heard the witnesses, and the dissenting judge below could find no justification for interfering with it.

IV. Remand for a new trial in the absence of a remittitur is not a proper exercise of the power to review, even if it does exist. This point need not now be pressed in view of respondent's concession.

ARGUMENT

I.

CONSTITUTIONAL LIMITATION

The Seventh Amendment to the Constitution provides, in part, that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals, by holding that the damages awarded by the jury and approved by the trial court were excessive in this case, has assumed a power which is constitutionally denied it.

Decisions of this Court

From its first decision dealing with this question, *Parsons v. Bedford*, 3 Pet. 433 (1830), to its most recent opinion touching upon it, *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), this Court has uniformly held that the appellate courts of the United States are prohibited by the Amendment from interfering with any finding of fact made by a jury and approved by the trial court. In *Parsons v. Bedford*, the principle was stated by Mr. Justice Story (447-448):

> "But the other clause of the amendment is still more important, and we read it as a substantial and inde-

pendent clause, 'No fact tried by jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. . . . The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings."

Following and confirming this principle were *Phillips v. Preston*, 5 How. 278 (1847), *Barreda v. Silsbee*, 21 How. 146 (1858), *Insurance Company v. Folsom*, 18 Wall. 237 (1873).

In *Railroad Co. v. Fraloff*, 100 U.S. 24 (1879), this Court first met the specific question of whether the alleged excessiveness of a verdict was reviewable on appeal. Holding that it was not, Mr. Justice Harlan said (31):

"No error of law appearing upon the record, this Court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been

tried by the jury under instructions correctly defining the legal rights of parties."

The specific question recurred and was similarly answered in *Wabash Railway Co. v. McDaniels*, 107 U.S. 454, 456 (1882); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887); *Arkansas Cattle Co. v. Mann*, 130 U.S. 69, 75 (1889); *Fitzgerald Const. Co. v. Fitzgerald*, 137 U.S. 98, 113 (1890); *Erie Railroad Co. v. Winter*, 143 U.S. 60, 75 (1892); *Lincoln v. Power*, 151 U.S. 436, 438 (1894); *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 469 (1903); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910); *Southern Ry. Co. v. Bennett*, 233 U.S. 80, 87 (1914); *St. Louis & S. R. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Louis. & Nash. R. Co. v. Holloway*, 246 U.S. 525, 529 (1918). That the denial of appellate power to review rested upon the Constitutional limitation was specifically stated in *Wabash Railway Co.*, *Metropolitan Railroad Co.*, and *Lincoln*, supra, and was clearly implied in *Arkansas Valley*, *Texas & Pacific*, *Waters-Pierce Oil Co.*, *Herencia*, *Southern Ry.*, *St. Louis & S. Ry.*, and *Louis. & Nash. R.R. Co.*, supra, by the Court's reliance on one or more of the decisions specifically so holding.

In *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474 (1933), this Court had reason to refer to its prior decisions while considering the right to review a nominal verdict and abstaining from deciding the question (485). There Mr. Justice Brandeis said (481-482):—

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. **The rule precludes likewise a review of such action by a Circuit Court of Appeals** . . . Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by

> a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'. More frequently the reason given for the denial of review is that the granting or refusal of a motion for a new trial is a matter within the discretion of the trial court." (Emphasis supplied)

Some of the language of this opinion has frequently been cited by the Courts of Appeals as indicating a departure by this Court from its earlier decisions. In the course of its disposition of the arguments made for reversal, the Court noted that it was urged that the "refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable" (485). The clear holding of the decision follows (485):

> "Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion . . . Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."

This language of the Court, carefully chosen so as to limit its decision to the precise question before it, cannot reasonably serve as an argument for the contrary position that appellate intervention may be justified on the ground of "abuse of discretion" by the trial court. Nothing said in *Fairmount Glass* can be construed to represent a departure by this Court from its long established position. In fact, when this Court later came to consider the authority of the trial court to direct an additur and the right of the Court of Appeals to reverse for the exercise of that right (when the defendant consents to it), both the majority and dissenting opinions conceded the earlier expressed view: *Dimick v. Schiedt*, 293 U.S. 474 (1935). Although the Courts of Appeals have used the dissenting opinion of Mr. Justice Stone as an argument against Seventh Amendment limitation (see infra), it will be observed that he there said (489):

> "As a corollary to these rules is the further one of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial."

Strength for an opposing view is also sought to be drawn from the comment by Mr. Justice Clark in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950) that the verdict (affirmed by the Court of Appeals) was not "monstrous". The Court of Appeals had not discussed the propriety of the verdict but had held (174 F. 2d 486) that it had no power to review it. Certainly, this parenthetical remark, unrelated to the decision in the case, does not indicate this Court's willingness to overrule prior authority.

Finally, the precise question here presented was before the Court on certiorari in *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), in which the Fourth Circuit was reversed for reviewing the amount of the verdict, without this Court reaching the basic question of appellate authority. This Court there said:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive."

In 1880, then, this Court established the principle that appellate review of issues of fact was prohibited by the Seventh Amendment and by 1879 it had specifically held that such prohibition extends to and includes the review of the alleged excessiveness of a verdict approved by the trial court. Its position has not varied to the present time.

Decisions of the Courts of Appeals

Despite the clear interdiction by this Court of such power, the Courts of Appeals have gradually moved from early acceptance to more recent denial of the authority of this Court's decisions. They have now assumed to exercise it and to review verdicts approved by the trial courts to determine whether they are excessive. This assumption of power has been variously justified by arguments that (a) "the rules of the common law" permitted appellate review, (b) review for "abuse of discretion" of the trial judge is not re-examination of a question of fact but a matter of law, and (c) the Seventh Amendment should be reinterpreted more broadly in the light of modern procedures. None of these arguments are valid.

It would serve little purpose to review in detail the excursion of these courts from acceptance of the principle of Constitutional limitation of their power, through rationalization of the "need" for appellate supervision, to the bold statement of inherent power, either ignoring this Court's decisions or declaring the invalidity of their bases. Examination of each of the three routes along which the journey has been taken will, we believe, expose its illogic. Their wide acceptance by the courts making them must be attributed to the conflict which Mr. Justice Black points out in his dissenting opinion in *Galloway v. United States*, 319 U.S. 372, 400 (1943) at 406:

> "Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: 'Such a reversal of opinion (as that of a particular state court concerning the jury function), if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration

for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges.

"What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result." (*Howe: Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 615-616).

(a)

The first argument advanced by the Courts of Appeals is that the right to review excessiveness of verdicts existed at common law prior to the adoption of the Seventh Amendment in 1791 and, therefore, such review is not prohibited. Although the courts making this argument sometimes concede that such judges as Mr. Justice Story were quite familiar with English practice (cf. *Dagnello v. Long Island Rail Road Co.*, 289 F. 2d 797, 803 (1961)),* they apparently assume that, in deciding the early cases above referred to, these Justices made no use of this personal knowledge. On this assumption, reliance is placed upon much more recent research into "the rules of the common law" existing prior to the adoption of the Amendment. The research relied upon is set forth in the majority and dissenting opinions of Judge Edwin R. Holmes, (CA5) in *Sunray Oil Corp. v. Albritton*, 187 F. 2d 475 and 188 F. 2d 751 (1951). A review of the authorities cited and discussed may be left for later discussion in considering the typical case relying upon it: *Dagnello v. Long Island Rail Road Co.*, 289 F. 2d 797 (1961). The conclusions reached are (1) that the amounts of verdicts were reviewed and remittiturs

* Cp. *Patrick Henry*, 3 *Elliott's Debates* 544:

"No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed."

were granted by the Court of King's Bench at Westminster on motions for new trials, (2) that the trial judge did not necessarily sit in the court en banc considering such motions, (3) hence: remittitur was a practice exercised by an appellate (reviewing) court prior to 1791. Although, at first reading, this conclusion may appear to be logical, it is basically fallacious. The authorities recited themselves demonstrate that the fallacy lies in the failure to recognize the nature of the Court of King's Bench and the practice before it.

Jurisdiction of the King's Bench was dual in nature: it was not only an appellate court, reviewing judgments of the common pleas and lesser courts, upon its own writs of error, but it was also a court of original jurisdiction for practically every type of action.[1] It generally sat at Westminster and was composed of a Chief Judge and three associate judges.[2] As a nisi prius court, however, it dispatched its individual judges to hold jury trials in the counties.[3] Motions for new trials after verdicts, however, were not heard at the place of trial, but were considered by the court en banc at Westminster.[4] Such a motion followed the verdict (postea)[5] and judgment was not entered until the motion was denied,[6] a practice which is still followed in many of our State courts. The definitive point is that the motion was passed upon by the same court in which the action was begun and in which it was tried. It is not factual to state that consideration of the motion constituted an appellate review. Not a single authority has been found in which King's Bench, acting as an appellate court after judgment, had granted a new trial or directed a remittitur for excessiveness of a verdict.

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[1] Holdsworth, History of English Law, Vol. 1, 212 ff; Radcliffe & Cross, The English Legal System (2d ed.) 161.

[2] 1 Tidd's Practice (1807) 28, 29.

[3] Holdsworth, op. cit. 281; 2 Tidd's Practice (1807) 772.

[4] Radcliffe & Cross, op. cit., 182.

[5] 2 Tidd's Practice (1807) 819 ff; Holdsworth, op. cit. 282.

[6] Tidd, op. cit. 841; 3 Blackstone, Commentaries, 393.

Appellate review was permitted to King's Bench from inferior courts and from King's Bench (as a trial court) to Exchequer Chambers or the House of Lords as a matter of right,[7] but no issue of fact ever was or could be re-examined on such review.[8]

Review of a jury verdict by the same court, even though by a different division of it and even though that division be designated as an "appellate court" is still review at the trial court level. This was specifically decided by this Court in *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 573 (1887).

Reliance is also frequently placed upon the historical data considered by Mr. Justice Stone (Chief Justice Hughes, Mr. Justice Brandeis and Mr. Justice Cardozo concurring) in his dissenting opinion in *Dimick v. Schiedt*, 293 U.S. 474, 488 (1935). This opinion, by reason of the preeminence of its authors, is certainly entitled to due consideration, but the issue before the Court in that case must be clearly understood. The trial judge, believing that the verdict of the jury was inadequate, directed an additur to which **the defendant agreed.** The First Circuit reversed (70 F. 2d 558) holding that the trial court's action violated the Seventh Amendment since the plaintiff's consent was not given. Mr. Justice Sutherland, speaking for this Court, found no English authority prior to 1791 which permitted an additur by the trial court and held that the practice of conditional remittitur consented to by the plaintiff did not authorize unconditional additur to which the plaintiff did not consent. The burden of the dissent is, first, that the action of the trial judge was discretionary and not subject to review by the Circuit (489) and, then, that the power of the trial judge is not so limited by the Amendment (495). The latter position is

[7] 3 Blackstone, 410-411; 2 Tidd's Practice (1807) 1051, 1059-1061; Radcliffe & Cross, op. cit. 208 ff.

[8] Tidd, op. cit. 1057; Patrick Henry, 3 Elliott's Debates 544.

justified by the assertion that the common law's "flexibility and capacity for growth and adoption" will permit the exercise of the trial judge's discretion by additur with the consent of the defendant since it undoubtedly allows remittitur with the consent of the plaintiff. The dissenter's position on the first issue is of no comfort to those seeking to avoid Constitutional limitation. It is consistent with the holdings of this Court prior thereto. The second point deals not with the power of the appellate court but with the discretionary power of the trial court and is of no moment here.

Let us consider the position taken by the Courts of Appeals on this point as set forth in detail. *Dagnello*, supra, is typical (and is cited as its authority by the court below in the case at bar). Judge Medina begins his opinion with a recitation (amply footnoted) that the State appellate courts have exercised the power of review (799), ignoring the fact that this Court has consistently held that the Seventh Amendment has no application to State courts: *Minn. & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Ches. & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). Proceeding to the position of this Court, he states (800) that "there is no clear and unequivocal holding" that a Seventh Amendment limitation exists, ignoring the decisions of this Court from 1830 to 1933. He brushes by the language of *Fairmount Glass Works* (800) and mentions *Affolder's* use of the word "monstrous" (801) as "no more than a hint" that appellate review is permissible. Next he quotes *Neese* (802) and refers to the rulings in other Circuits (802) without apparent recognition of the complete difference between their holdings and the *Neese* dictum, a difference fully recognized later by his own Circuit in *Caskey*, (infra). Following this, his argument goes to common law history that "motions for new trial were not addressed to the trial judges", a half-truth (ignoring

Blackstone[9] and Mr. Justice Story[10] since it was the court en banc which had this power in the Court of King's Bench, the trial judge usually (if not always) sitting on the Court: *Jones v. Sparrow*, 101 E.R. 144, 5 T.R. 257 (1793); *Ducker v. Wood*, 99 E.R. 1092, 1 T.R. 277 (1786). He quotes the dissent in *Dimick* extensively (803-804). Holding (804) that the English precedents there cited permitted "appellate review", he ignores *Metropolitan Railroad Co. v. Moore*, in which this Court specifically held that review by the same court was not appellate review, even though the procedure to obtain it was labeled an "appeal" instead of a "motion for new trial".

The argument made on this point is not impressive. (It is coupled, however, with the other arguments which we will discuss below.) His conclusion (806) that "It is strange that the rule of non-reviewability should have hung on so long, despite the practically unanimous protests of text writers and commentators" is difficult to accept. In the first place, the leading authority today has this to say: *Barron & Holtzoff, Federal Practice and Procedure* (Rules Ed. 1958), Vol. 3, §1302.1, p. 55:

> "To allow appellate review of his action would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge, by denying the motion for a new trial, has found that the verdict is not contrary to the clear weight of the evidence. This would be a complete re-

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[9] 3 Blackstone, Commentaries, 392-393: "And it is worthy (of) observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe . . . the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation. With us no new trial is allowed unless there be manifest mistake, and the subject-matter be worthy of interposition."

[10] Parsons v. Bedford, 3 Pet. 433.

versal of the common law practice, and does not seem consistent with the Seventh Amendment."

Secondly, to assume that any text writer (including student law review commentators) is in a better position to evaluate the status of the English common law prior to 1791 than Mr. Justice Story and his colleagues at the turn of the century is presumptuous. Finally, to disregard and ignore every opinion on the subject written by this Court prior to 1933 is unforgivable. No decision of any other Court of Appeals using this argument adds weight to it and an extended review of them would be unproductive. They are collated in *Barron & Holtzoff*, op. cit. supra, at pp. 348 ff.

Having no forebears in the common law, appellate power to review the quantum of verdicts may not be assumed without violating the Seventh Amendment.

(b)

It is also argued that an appellate court may review the "discretion" of the trial judge and reverse for "abuse of discretion" in failing to set aside or reduce the amount of a verdict. This argument proceeds on the basis that although the trial judge's review of the jury's verdict is a review of "fact", the appellate review for "abuse of discretion" is a review of a question of law and so not prohibited by the Amendment. The argument is unsound.

That the amount of a verdict is "purely a question of fact" has been reiterated by this Court in many of its decisions: cf. *Dimick v. Schiedt*, 293 U.S. 474; 486 (1935); *St. Louis & S. R. Co. v. Craft*, 237 U.S. 648, 661 (1915); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887). In what manner does the exercise of the trial judge's discretion in reviewing this "question of fact" become converted into a "question of law"? Again we refer to the prototype, *Dagnello* (806): ". . . but surely there must be an upper limit, and whether that has been

surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." Justice Medina gives no explanation as to how this tranformation takes place. In no other area is it applied or even suggested. If it were true, how would it be applied? It must follow that every issue of fact may be converted into a question of law upon which both appellate courts may bring to bear their own discretion as to whether discretion has been properly exercised below. This is unthinkable. As Mr. Justice Black has said in *Galloway* (supra, at 407):

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: 'Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right.' So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeals are the primary custodians of the Amendment."

If this conversion from fact to law at the discretion of the appellate courts is recognized, review must be permitted of every issue of fact referred to below in which the evidence against the verdict may be designated on appeal as being overwhelming or opposed to physical facts or the like. When passing an "upper limit" in amount becomes a question of law, so must also passing an upper limit in

the amount of testimony presented against any other factual issue. Even judges who accept the "abuse of discretion" view, sometimes are led to question its validity. Consider Judge Sobeloff's note in *Simmons v. Avisco, Local 713*, 350 F. 2d 1012, 1020 (1965):

> "If it seems strange for the higher tribunal to have in this area less freedom than the lower, it is a lesser anomaly than exists in the federal criminal law, where appellate courts are without power to review sentences imposed by district judges. More instances arise where we would be moved to reduce extravagant prison sentences than immoderate jury awards in civil cases. In both instances we must respect the boundaries of our authority, and a change in the policy does not lie in our hands but must be legislatively ordained."

(Cf. *United States v. Johnson*, 327 U.S. 106, 111 (1946)).

The refusal of this Court to grant certiorari heretofore (except in *Neese*) has permitted the Courts of Appeals to act without further definition of the principle upon which they may act. Differing as they do in the approach of each Circuit and even in succeeding decisions of the same Circuit, they have a common factor. Each test is a subjective one. The determination of each case may as well be based upon the state of a circuit judge's digestion as his state of mind. And its application in a particular case may be as uncertain as the former. Its effect is to permit discretion to overrule discretion. If the power of supervision is to be recognized it must be exercised upon an objective basis. The difference is not only in degree but in kind.

Even what appears to be purely objective assessment of excessiveness in value of very ordinary things will, upon careful consideration, be found to be subjective. For example: the average person would probably say that a cup of coffee should cost fifteen cents, that a quarter

or half-dollar for a cup would be "excessive" but not "monstrous". Yet, the restaurant which charges a dollar and a half is not without customers. More analogous to the evaluation of "pain and suffering" would be the price demanded for a work of art. Here excessiveness would be purely subjective. The best evidence of this is the bidding at an auction of paintings. Even the successful bidder may feel that the price he has paid is "excessive"; his competitors certainly must have felt so. But now once removed is the buyer's wife, friend or another art dealer who "second-guesses" the value of the purchase.

So it must be with the subjective reaction of an appellate judge as to whether the trial judge "abused his discretion" in reviewing the excessiveness of the verdict of a jury. Perhaps the word "monstrous" used by this Court in *Affolder* is the proper one; not in the way it was analogyzed to "excessive or extraordinary" by Circuit Judge Holmes (187 F. 2d at 484) but in the way it was originally used by the Lord Chief Justice in *Beardmore v. Carrington*, 2 Wilson 244, 95 E.R. 790 (1764): . . . "the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush". "All mankind" certainly cannot be said to "exclaim against" the verdict in the case at bar when the trial judge who saw and heard the parties and the witnesses approved it fully and one of the three reviewing judges felt that it was justified by the evidence.

Judge Learned Hand is frequently quoted as an exponent of the view that appellate review is desirable. This is true: *Miller v. Maryland Casualty Co.*, 40 F. 2d 463, 465 (1930); but it is he who suggested "unconditional power to review" (*ibid*), which this Court has already specifically denied in *Neese*. In the same decision, his view of the "abuse of discretion" rule is quite to the contrary. Of it he says (465):

> "That is an impracticable rule . . . The trial judge decides what verdict is within the bounds of reasonable

> inference from the evidence . . . we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements."

Even Judge Holmes, in his oft-quoted opinion in *Sun-Ray Oil Corp.*, supra (187 F. 2d at 482) says of the principle of review for abuse of discretion: "This is judging by remote control, and at best is a circuitous and unsatisfactory method."

The extent to which a purely subjective approach may affect the exercise of the judicial function is well demonstrated by the unsupported barb thrust at the trial judge by the court below (A. 64):

> "In his enthusiasm for what he described to the jury after the verdict as their fine 'spirit' and 'dedication' and 'with resounding emphasis in plaintiff's favor all down the line' the trial judge, we think, supplied any 'absence of exaggeration' in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent."

Once this Court were to agree that review by a Court of Appeals is permissible, it must likewise agree that it will, in like manner, review the latter's action in any case in which it disagrees with the trial court. Since "abuse of discretion" would thereby be established as being a question of law, its exercise by the Court of Appeals must be equally reviewable for its abuse. The "abuse of discretion" view is based upon the assumption that competence to exercise discretion multiplies with the number of judges who act despite their

admitted shortcomings in examining the evidence because they did not see or hear the parties and the witnesses.[11] What, then, of the appellate bench which is divided (as was the court below)? Or a court of appeals which, having seven members en banc, divides four to three? Or this Court, which not infrequently must decide important causes by a bare majority or affirm by an equally divided vote? On such a subjective matter as "abuse of discretion" can it justly be contended that an equal number of judges who have passed upon the issue and divided so sharply have disposed of it by any other than "tenuous unrealities" and to have bound the parties by "gossamer strands"?

(c)

A final argument is made that modern procedures recommend the reexamination of this Court's early decisions and reinterpretation of the Amendment. Our history leaves no doubt that our forebears considered trial of fact by jury rather than by judges an essential bulwark of their liberty. The Constitution, in providing for the establishment of the courts, contained no provision guaranteeing this right in civil cases. Mr. Justice Gray in *Capital Traction Company v. Hof*, 174 U.S. 1 (1899) and Mr. Justice Black, dissenting, in *Galloway v. United States*, 319 U.S. 372, 397 (1943), have reviewed the origin of the Seventh Amendment and demonstrated beyond peradventure that its very purpose was to prevent judges from interfering with factual decisions.

If the history of the English law prior to 1791 and the history of the Colonies at that time prove anything, it is the unwillingness of the citizen (and lawmaker) to submit issues of fact to the decision (or discretion) of the judges. Their faith lay in the jury and any interference with its decision could not be countenanced. It is impossible to

[11] Hinton, 1 U. of Chi. L.R. 111, 113, suggests that the lack of review in appellate courts in England may be ascribed to the en banc hearing of new trial motions by "four judges who were quite as competent to handle the matter as any reviewing court."

imagine that those who insisted upon the adoption of the Seventh Amendment would have approved its language were they not certain that appellate review of facts found by a jury would not be disturbed except by the court in which the jury served.

Now to reinterpret it so as to permit such review on the basis of "discretion" would not only destroy the constitutional right which deserves preservation but would disservice the administration of justice.

II.

FEDERAL EMPLOYERS' LIABILITY ACT

Assuming (as we must for the purpose fo this argument) that this Court may decide that the action of the court below is not constitutionally prohibited, to what extent may it be exercised in an action under the Federal Employers' Liability Act? We do not claim that the Act limits the "jurisdiction" of Courts of Appeals as does the Seventh Amendment. Our position is that, under the decisions of this Court, appellate review of actions under this Act is so narrowly limited that "abuse of discretion" (the reason asserted by the court below) is not an authorized ground for appellate intervention.

The preservation of the integrity of a jury verdict in an action under the Act is an integral part of the right to trial by jury given the railroad worker. In *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359 at 363 (1952), Mr Justice Black, quoting the language of *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943) stated:—

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence'; . . . that it is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act; and that to deprive railroad workers of the benefit of a jury trial where there is evidence of negligence 'is to

take away a goodly portion of the relief which Congress has afforded them.' "

This Court has been firm in safeguarding this right. The limitation on the power of the Courts of Appeals in these cases has been reiterated to be no more than to determine whether there is any evidence whatever to support the jury verdict. It does not include interference with findings of fact if supported by the record. As stated by Mr. Justice Murphy in *Lavender v. Kurn*, 327 U.S. 645 (1946) at 653:—

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and **the appellate courts' function is exhausted when that evidentiary basis becomes apparent**, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis supplied).

Therefore, this Court has consistently reversed every appellate interference with a jury verdict, unless there was a complete absence of supporting evidence. *Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Ellis v. Union Pacific R. Co.*, 329 U.S. 649 (1947); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Stinson v. Atl. Coast Line R. Co.*, 355 U.S. 62 (1957); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957); *Moore v. Terminal Railroad Assn.*, 358 U.S. 31 (1958); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15 (1959); *Basham v. Pennsylvania R. Co.*, 372 U.S. 699 (1963); *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1968); *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248 (1963); *Dennis v. Denver & Rio Grande R. Co.*, 375 U.S. 208 (1968). This test has been applied to

such fact issues as negligence: *Rogers v. Missouri Pacific R. Co.*, supra; employment status: *Baker v. Texas & P. R. Co.*, 359 U.S. 227 (1959); medical causation: *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959); legal causation: *Gallick v. Baltimore & Ohio R. Co.*, supra; and validity of a release: *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359.

The amount which should be properly awarded as damages is no less a fact issue, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Metropolitan Railroad Co. v. Moore*, 121 U.S. 558, 574 (1887). In *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955), this Court stated that the power to review the excessiveness of a verdict (if it exists at all) is as narrowly limited as it is as to any other issue of fact:

> "We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The power of review, therefore, does not include the power to declare that a trial judge has abused his discretion or to set aside or reduce a verdict because, subjectively, it is thought to be excessive. The appellate power to interfere is exhausted if there is any evidence in the record to sustain the verdict. It is not increased by the difference in remedy afforded when the limited power thus given is exercised. If, within its scope, an issue of liability may be found to be completely unsupported by any evidence, a judgment n.o.v. may be entered. If, within the identical scope, the amount of a verdict is found to have no support whatsoever in the evi-

dence, a new trial may be ordered or a remittitur directed. In either case the test is the same, the limitation on appellate power is the same, and in neither situation may the Court of Appeals interfere merely because it believes that the trial judge "abused his discretion" or it subjectively feels that the "verdict was excessive".

The action of the court below is not based upon the standard so enunciated. Although its own most recent decision (*Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (1967)), recognizes the rule enunciated in *Neese*, both this decision and *Neese* are ignored. The majority of the panel of the court below makes no effort to demonstrate that the "action of the trial court . . . (is) not without support in the record". It briefly reviews the nature of the injuries (A. 65, 388 F. 2d at 484) but the evidence upon which the jury reached its verdict is not otherwise examined. Nor is any effort made to explain its refusal to consider or accept clearly expressed findings of the trial judge justifying his action in approving the jury's verdict (A. 54). Nor does it attempt to characterize his action as an "abuse of discretion" or even that it "shocks the conscience of the court". It confines itself to its unsupported conclusion that the verdict is "grossly excessive" (A. 61, 64, 388 F. 2d at 482, 483).

That this is not a justifiable ground for appellate intervention, even under the prior decisions of its own Circuit, is succinctly stated by Circuit Judge Hays in his dissenting opinion (A. 66, 67; 388 F. 2d at 485).

III.

THE VERDICT IS SUPPORTED BY THE RECORD

A review of the evidence will demonstrate unequivocally that "the action of the trial court . . . (is) not without support in the record . . ." *Neese v. Southern Ry. Co.*, supra.

Petitioner sustained crushing injuries of the right foot which have resulted in total and permanent disability and

continuous pain and suffering. He proved (without contradiction) that he was a strong, healthy individual, 41 years of age at the time of this accident, and that he had worked for the respondent in laboring work for over 20 years prior thereto (A. 31). At the time of his injury he was earning over $6,000 per year (A. 48) and wages for employes in his classification have consistently increased since his injury (A. 27). On the basis of this evidence, he had lost over $27,000 (less a few dollars earned at odd jobs) up to the time of trial.

At the time of trial, petitioner's life expectancy was 27.5 years according to the latest U.S. Life Tables for white males (A. 48). Since there was no compulsory retirement age and petitioner's job was admittedly secured (except for discharge for cause) (A. 27, 28), the jury was entitled to find that his loss of future earnings (earning power) amounts to at least $165,000. Argument was made by the respondent that petitioner still had some earning power in the future but this the jury apparently refused to accept. The reason is clear from the record: petitioner has never worked at a sedentary job (A. 31), he has been refused reemployment by the railroad (A. 38, 43), his Brotherhood is unable to secure him such employment (A. 28) and his injury prevents him from sitting, standing or walking for any extended time (A. 20, 24). In addition, he is an employment risk for any prospective employer: his foot is, after 4½ years, still in such condition that a minor bump or bruise may cause the lesions to break out again (A. 20) and increase in the pain he suffers may necessitate amputation of the foot (A. 19). It would be foolhardy for any employer to hire him and expose itself to these dangers—this was clear to the jury from the uncontradicted medical testimony.

Respondent argued to the trial judge on its motion for new trial that this prospective loss of earning power must be reduced to "present worth". It did not except to the Court's instruction on this question. It completely

overlooked the fact that assured increases in wage rates (A. 27), overtime work (A. 48) and the probability of promotion to higher paying jobs might amount to as much or more than the discount rate of "present worth" to be considered. These matters and how they would affect petitioner's losses were equally for the jury's sole consideration. Certainly it was not only within their province but only fair, just and reasonable that the verdict include at least $27,000 lost to date plus at least $165,000 for loss of future earning power, a minimum total of $192,000.

We now come to the jury's assessment of the value of the petitioner's pain, suffering, inconvenience and embarrassment. The medical testimony was unquestioned. Petitioner has had five separate hospitalizations (A. 6-11) during which he has had two operations on his foot (A. 11, 14) and a sympathectomy to help restore the blood supply (A. 8). The bones of the toes were crushed into a mass without movement and with no hope of improvement (A. 16-19). Weeping sinuses have been closed but the skin is subject to breaking down upon minor contact (A. 20, 38). Pain has persisted for 4½ years and it is continuous (A. 36, 39). To this point, petitioner has been able to live with it, treating the foot daily and limping along through his daily routine (A. 40). Should the pain be increased by a bruise or bump or the circulation be further impaired or infection (to which he will be highly susceptible) set in, amputation will be his sole choice (A. 20). In addition, petitioner was entitled to be compensated for the effect of his injuries upon his normal pursuits and pleasures of life (A. 66). The Court charged the jury fairly (and without objection by the respondent) on all of these issues. It would not have been shocking had the jury determined that the monetary value of his pain, suffering and inconvenience was in excess of the out-of-pocket losses which he has suffered and will suffer. They may well have assessed $113,000 for this item in addition to the $192,000 previously determined. Or they may reasonably have reduced

the $192,000 figure and increased the $113,000 materially. The trial judge expressed the view that the evidence supported the verdict based upon an assessment of $27,000 for lost wages, $150,000 for loss of future earning power and $150,000 for pain and suffering (A. 56), so that a total verdict of $327,000 would not have been excessive.

With this uncontested proof in evidence, what justification can be found to declare that the verdict is "without support in the record"? The majoriy made no attempt to do so. The dissenting member of the Court of Appeals' panel could find none (A. 66); he accurately stated that the court was merely substituting its opinion for the verdict of the jury (A. 67).

The case at bar presents a much stronger case for reversal on the merits than did *Neese*. There the Court of Appeals extensively reviewed the testimony, all of which related to losses which could be calculated mathematically, and reversed because it felt that it could not justify the reduced verdict. Here only a portion of the verdict could be calculated mathematically but even that part the lower court did not attempt to review in its opinion.

It may well be that, so long as the Courts of Appeals adhere to the limitations of *Neese*, this Court will continue to abstain from restating the constitutional restriction upon appellate power. But when, as here, a long stride backward from its teaching is taken without justification, intercession on an ad hoc basis is necessitated and restatement may well be indicated. Early in our judicial history Mr. Justice Story recognized that permitting review of the exercise of discretion in any case will encourage appeals and is "against sound policy and public convenience". *Hobart v. Drogan*, 10 Pet. 108, 119 (1836).

IV.

Petitioner concedes that, if this Court should hold that the Court of Appeals has the power to grant a new trial and is justified in doing so upon the present record, it also has the power to make and is justified in making the order of remittitur which it did make in this case, as contended for the Respondent.

The final point made in the petition for certiorari need not now be urged. It was there contended that the remand for a new trial generally in the absence of a remittitur was improper. Respondent, in its Brief in Opposition (11) "interprets the mandate below as requiring a new trial on damages" alone and assumes to urge such a construction thereof should the occasion arise. This the petitioner accepts.

CONCLUSION

The decision of the Court of Appeals should, therefore, be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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No. 35

Supreme Court of the United States

OCTOBER TERM, 1968

CARL F. GRUNENTHAL, *Petitioner*,

v.

THE LONG ISLAND RAIL ROAD COMPANY, *Respondent*.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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July 1968

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is printed in the appendix (A. 59-68), and it is reported at 388 F.2d 480. The opinion of the United States District Court for the Southern District of New York (A. 54-58) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1968. (A. 1). The petition for certiorari was filed on February 28, 1968, and was granted on May 6, 1968. (A. 2). The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does the Seventh Amendment preclude an appellate court from reversing a trial judge who refuses to order a new trial or remittitur of excessive damages when the damages awarded by a jury are sustainable upon no rational view of the evidence?

(2) If not, does the Federal Employers' Liability Act, 45 U.S.C. § 51, restrict such appellate court action in cases brought under the Act?

(3) On the facts of this case, did the court below err in holding that the verdict was so grossly excessive that it should not be permitted to stand because "after giving Grunenthal the benefit of every doubt" the court could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000"?[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Constitution of the United States and Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, are set forth at page 2 of the petitioner's brief.

STATEMENT

The petitioner filed a complaint under the Federal Employers' Liability Act (hereinafter "FELA") to recover $250,000 damages for personal injuries sustained in the course of his employment.

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[1] In his petition for certiorari, the petitioner raised a fourth question concerning the power of the Court of Appeals to order a new trial on the issue of liability as well as damages. In view of the respondent's interpretation of the mandate below as requiring a new trial on damages only, the petitioner no longer urges that question upon the Court. Petitioner's Brief (hereinafter "Br.") p. 29.

Trial was to a jury, and by agreement the liability and damage issues were tried separately. (A. 3). The jury found against the respondent on the question of liability. (A. 3). No issues concerning liability are now before the Court.

Following the verdict on liability, the damage issues were tried to the same jury. The petitioner relied primarily upon two witnesses, Dr. Cohen, who testified as to his physical condition (A. 4-26), and the petitioner himself who testified as to both the pain and suffering he had experienced as a result of his injury and the efforts he had made to obtain employment following the accident. (A. 31-48). The respondent called no witnesses. (R. 548).

Dr. Cohen described the petitioner's injury as having been caused by a railroad tie that slipped and fell on his foot. (A. 6). The injury itself was a compound fracture that involved the crushing and shattering of the great toe joint of his right foot and accompanying fractures of the metatarsal and the second metatarsal. (A. 6). The witness also described the complications that the petitioner had experienced with respect to this injury (A. 6-14), but testified that at the time of trial the condition of the foot had improved. (A. 14). In summary, he described the injury as "all in all . . . a poor functioning foot." (A. 19). The doctor stated that while the petitioner should not do heavy work on his feet (A. 20) he could work in sedentary capacities or in a job that required driving an automobile. (A. 23-24). Thus, in Dr. Cohen's view the petitioner was not totally and completely disabled. (A. 24).

The petitioner testified that he had worked for the railroad since he was 20 years old, being 45 at the time

of trial. (A. 31). During these years, the petitioner had engaged solely in "trackman work."[2] (A. 31). The petitioner described his efforts to obtain work prior to the trial and stated that for six months or a year before trial he had held a custodial job, working a couple of days a week. (A. 38-39). He also described the pain that he had experienced from his injury, likening it to a "dull toothache" (A. 37), that becomes more painful in damp weather. (A. 39). He stated that it had been "bearable," being something that he now takes for granted, without letting it bother him. (A. 40).

Following this testimony and the instructions of the trial court on damages, the jury returned an award of $305,000. (A. 49). The respondent attacked this verdict on the ground that it was excessive. (A. 49, 51-53). The respondent's motions for relief were denied (A. 58), and judgment was entered on the verdict after the petitioner was allowed to amend the claim for damages in his complaint from $250,000 to $305,000 to comprehend the jury's award. (A. 59).

The respondent appealed to the Court of Appeals for the Second Circuit upon the ground, among others, that the verdict was grossly excessive.[3] (A. 2). The Court of Appeals announced that in dealing with this claim it would apply the standard it had previously established in *Dagnello* v. *Long Is. R. R.*, 289 F.2d 797 (1961). (A. 64). Thus, after "giving [the petitioner]

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[2] Subsequently, the petitioner's counsel offered in evidence the respondent's answer to an interrogatory that indicated the petitioner had in the year of the accident earned $4,258.87 through the 19th of September. (A. 48).

[3] The other grounds of appeal are no longer in issue.

the benefit of every doubt" it held that it could not "in any rational manner consistent with the evidence arrive at a sum in excess of $200,000" as compensation for the petitioner's injuries. (A. 66). Accordingly, the Court of Appeals ordered that the petitioner be given the option of remitting the part of his verdict that exceeded $200,000 or taking a new trial. (A. 66). The petitioner seeks review of this ruling.

SUMMARY OF ARGUMENT

I

The Seventh Amendment does not deprive an appellate court of power to review the refusal of a trial court to grant a motion for a new trial based on the amount of the verdict, for in exercising this power the appellate court only inquires whether the verdict is excessive or inadequate as a matter of law because there is no evidence that provides a rational basis for the amount of the verdict. The court below applied this legal standard. It gave the petitioner "the benefit of every doubt" and sought "any rational manner consistent with the evidence" to justify his verdict. This legal standard is the same one that permits an appellate court to enter judgment *n.o.v.*, and this Court has recently held that appellate action under this standard is not forbidden by the Seventh Amendment. *Neely* v. *Eby Const. Co.*, 386 U.S. 317.

All eleven of the courts of appeals have held that they have the power to order a new trial or a remittitur if they find that a verdict is excessive as a matter of law. These decisions are not in conflict with any controlling decisions of this Court interpreting and applying the Seventh Amendment. The suggestion by petitioner that the early opinions of this Court establish

a rigid and absolute constitutional prohibition against the appellate power here in issue is inconsistent with later statements of this Court. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482; *Affolder* v. *New York, C. & St.L. R.R.*, 339 U.S. 96; *Neese* v. *Southern Railway*, 350 U.S. 77.

Since petitioner must concede that a trial court is not precluded by the Seventh Amendment from ordering a new trial or a remittitur on the ground that the amount of the verdict is excessive, he is necessarily driven to the position that an appellate court lacks this power because it was not a power exercised by appellate courts at common law prior to the adoption of the Amendment. There is no merit in this argument from history. The Seventh Amendment does not impose as constitutional limitations all of the intricacies and formalities of common law procedure, but preserves the substance of the right to a jury trial. *Gasoline Prods. Co.* v. *Chaplin Ref. Co.*, 283 U.S. 494. Thus the remittitur itself, which was unknown at common law, is not forbidden by the Seventh Amendment because it is not an interference with the substance of the right protected by that Amendment. At common law prior to the adoption of the Amendment motions for new trials were heard by four judges of the Court of King's Bench sitting *en banc*. Review by a court of appeals of the action of a trial judge in ruling on a motion for a new trial does not therefore differ in effect or substance from the common law practice and is not inconsistent with the Seventh Amendment.

The petitioner's contention that judicial policy requires the constitutional limitation for which he argues is refuted by the practice of all eleven federal Courts

of Appeals that have successfully exercised the appellate power here in question.

II

Petitioner's argument that the FELA imposes special restrictions upon appellate review of decisions denying motions for a new trial on the ground that the verdict is excessive is not supported by any authority. "[T]he system of judicial supervision still exists in this as in other types of cases." *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). The courts of appeals in determining whether a trial court erred in denying a motion for a new trial based on the claim that the verdict was excessive have applied the same standards in FELA cases as they have applied in other civil actions.

Petitioner's argument cannot logically be confined in its application to the power of appellate courts in FELA cases. It is an argument that strikes equally at the power of the trial court and is in substance a contention that under the FELA any evidence of injury no matter how small justifies any award of damages no matter how large or irrational it may be and that the amount of the jury verdict is, for all practical purposes, immune from any judicial supervision or control. This position is not supported by the cases petitioner cites. Those cases hold that slight evidence is sufficient to sustain a jury verdict on liability, and they are explained by the fact that under the statute substantive liability with respect to any work-related injury is strict and indeed approaches the absolute. That fact, however, does not support petitioner's argument that there is and should be no effective judicial supervision over the amount of dam-

ages. Moreover, petitioner's argument overlooks the consistent use of remittiturs in FELA cases. *Neese* v. *Southern Ry., supra.*

III

The Court of Appeals properly held that there was no evidence, even when the record was read in the light most favorable to the petitioner, that would provide a reasonable basis for a verdict in the amount of $305,000. The complaint did not seek damages in that amount, nor did counsel for the petitioner in his summation ask the jury for that sum. Petitioner's own witness testified that he was not totally and completely disabled, but that he was capable of performing certain types of remunerative labor, and the petitioner himself stated that he had worked for six months or a year prior to trial. Petitioner on direct examination testified that the pain and suffering he experienced was "bearable" and something that he "take[s] . . . for granted now."

Accepting all this evidence at face value and giving the petitioner the benefit of all inferences therefrom, the Court of Appeals correctly held that there was no rational manner in which it could sustain the amount of the award which the jury had given. The Court of Appeals was therefore bound as a matter of law to declare that the verdict was excessive.

ARGUMENT

I. THE SEVENTH AMENDMENT DOES NOT DEPRIVE AN APPELLATE COURT OF AUTHORITY TO REVIEW A TRIAL COURT'S DENIAL OF A MOTION FOR A NEW TRIAL BASED ON THE GROUND THAT THE VERDICT WAS EXCESSIVE.

The petitioner contends that the Seventh Amendment prohibits any appellate review of a trial judge's denial of a motion for a new trial based on the amount of the verdict. This constitutional argument is directed solely to an asserted limitation on the power of appellate courts; petitioner does not suggest that a trial court lacks the authority to order a new trial or a remittitur on the ground that a verdict is excessive.[4] Indeed, the argument is that under the Seventh Amendment the authority of the trial court is absolute and that its denial of a motion for a new trial, whether based on a claim that the jury verdict was excessive or inadequate, is constitutionally insulated from any appellate supervision or control, even if the denial is an abuse of discretion.

All eleven federal Courts of Appeal in exercising the appellate power here in question have rejected arguments similar to petitioner's.[5] Petitioner argues that in so doing these courts have ignored and disregarded

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[4] The abundance of the authority in this Court precludes any suggestion that there is a lack of power generally in the federal courts to employ remittiturs to reduce a jury's verdict. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160; Linn v. United Plant Guard Workers, 383 U.S. 53, 65-66; Neese v. Southern Ry., 350 U.S. 77; Affolder v. New York, C.&St.L.R.R., 339 U.S. 96; Dimick v. Schiedt, 293 U.S. 474, 484-85; Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75; Northern Pac. R.R. v. Herbert, 116 U.S. 642, 646-47. See also Blunt v. Little, Fed. Cas. No. 1,578 (C.C.D. Mass. 1822) (Story, Circuit Justice).

[5] See p. 13, *infra*.

decisions of this Court which petitioner describes as controlling and which, he says, rest upon common law practice and procedure as it existed prior to the adoption of the Constitution. The petitioner is wrong on both grounds. The decisions of this Court interpreting and applying the Seventh Amendment do not support petitioner's position and the constitutional limitation petitioner seeks to derive from archaic common law practice and procedure is unjustified.

A. The Federal Courts of Appeals Have the Same Power To Review Motions for Remittiturs as They Have To Review Motions for Judgments Notwithstanding the Verdict.

In an opinion rendered less than two years ago, *Neely* v. *Eby Const. Co.*, 386 U.S. 317, this Court rejected a Seventh Amendment argument that only trial courts could enter judgments *n.o.v.*:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does . . . ." 386 U.S. at 322.

Since the standard applied by appellate courts in reviewing remittiturs is precisely that used by them in reviewing judgments *n.o.v.*, it follows that the power confirmed in *Neely* controls disposition of the petitioner's Seventh Amendment contention in the present case.

The similarity between the action of the Second Circuit and that of a court of appeals reviewing the denial of a motion for judgment *n.o.v.* is plainly disclosed by the opinion below. The Court of Appeals, although "giving Grunenthal the benefit of every doubt," was unable "in any rational manner consistent with the evidence [to] arrive at a sum in excess of $200,000"

(A. 66), and therefore held the petitioner must accept a remittitur reducing his damages to that sum or face a new trial.

By giving the petitioner the benefit of every doubt, the court clearly indicated that it was not judging the credibility of his witnesses, but rather was accepting all their testimony.[6] By seeking to justify the jury's verdict "in any rational manner consistent with the evidence," the court below plainly gave all possible favorable inferences to the petitioner. Having done this, and still being unable to justify an award in excess of $200,000, the Court of Appeals found in effect that there was no evidence to support a recovery for the petitioner in excess of that sum.

This analysis is precisely the one employed by trial and appellate courts in passing upon motions for directed verdicts and for judgments *n.o.v.* See *e.g., Continental Co.* v. *Union Carbide,* 370 U.S. 690, 696, where this Court stated that the court of appeals in determining the sufficiency of evidence to take a case to a jury

> "was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

See also *Galloway* v. *United States,* 319 U.S. 372, 395. But when the evidence is so viewed and when "there can be but one reasonable conclusion as to the verdict," the court must grant a judgment *n.o.v. Brady* v. *South-*

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[6] The Court of Appeals could not have weighed the respondent's evidence on damages against the petitioner's, since the respondent called no witnesses on this issue. (R. 548).

ern Ry., 320 U.S. 476, 479-80. See also *Gunning* v. *Cooley*, 281 U.S. 90, 94; *Randall* v. *Baltimore & O.R.R.*, 109 U.S. 478, 482.

The petitioner objects that reviewing a district judge's denial of a motion for a new trial based upon the amount of the verdict constitutes review of the jury's findings of fact. (Br. 16-17). But the same argument could be made concerning review of a motion for judgment *n.o.v.* For the similarity between the issues of the sufficiency of evidence to sustain a finding of liability and the sufficiency of evidence to justify a particular damage award is readily apparent.

Thus, for example, in passing upon a defendant's motion for a directed verdict in a negligence case, the court views the evidence in the light most favorable to the plaintiff and determines whether a jury could on that evidence reasonably find as a matter of law that the defendant was negligent. In making this judgment the court has recourse to a principle of law—the reasonable man standard—and is not therefore engaged in a review of the facts as barred by the Seventh Amendment. *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593, 596. Cf. Holmes, *The Common Law* 120-21 (1881).

By the same token, in approaching questions of remittitur in the manner below there is no review of facts. The court accepts the facts in the light most favorable to the plaintiff and decides whether the jury correctly applied the applicable legal standard—what is a reasonable award on those facts. If the jury did not correctly apply this legal standard, the court may set aside the plaintiff's award and order a new trial. Or it may, as the court below did here, offer him the option either of taking the verdict that is the highest possible under the proof he has produced or of taking a new trial.

The application of remittiturs by the test used below does not, therefore, involve an inquiry into the facts as found by the jury, but instead turns solely upon a question of law. There is, as a consequence, nothing in the Seventh Amendment that limits this inquiry by courts of appeals, and all eleven federal Courts of Appeals have so held. *Boyle* v. *Bond,* 187 F.2d 362 (D.C. Cir. 1951); *Compania Trasatlantica Espanola, S.A.* v. *Melendez Torres,* 358 F.2d 209 (1st Cir. 1966); *Russell* v. *Monongahela Ry.,* 262 F.2d 349, 352 (3d Cir. 1958); *Virginian Ry.* v. *Armentrout,* 166 F.2d 400 (4th Cir. 1948); *Glazer* v. *Glazer,* 374 F.2d 390 (5th Cir. 1967), *cert. denied,* 389 U.S. 831; *Gault* v. *Poor Sisters of St. Francis,* 375 F.2d 539, 547-48 (6th Cir. 1967); *Bucher* v. *Krause,* 200 F.2d 576, 586-87 (7th Cir. 1952), *cert. denied,* 345 U.S. 997; *Bankers Life & Cas. Co.* v. *Kirtley,* 307 F.2d 418 (8th Cir. 1962); *Covey Gas & Oil Co.* v. *Checketts,* 187 F.2d 561 (9th Cir. 1951); *Barnes* v. *Smith,* 305 F.2d 226, 228 (10th Cir. 1962).

The petitioner's contention with respect to appellate review of jury-found facts would perhaps have more weight if the courts of appeals applied the same test that is used by trial judges in ordering remittiturs. For trial judges can set aside a jury award on grounds of excessiveness when in their view, considering the demeanor of the witnesses tendered by the plaintiff, etc., the verdict is excessive as a matter of fact. *Williams* v. *Nichols,* 266 F.2d 389 (4th Cir. 1959); *Sunray Oil Corp.* v. *Allbritton,* 188 F.2d 751 (5th Cir. 1951) (concurring opinion). But the "teaching of *Dagnello* v. *Long Island R.R.,* 289 F.2d 797 (2d Cir. 1961)," which the Second Circuit applied in the instant case (A. 64), expressly recognizes the greater range of au-

thority that the trial judge has in passing upon questions of excessiveness and disclaims application by the Court of Appeals of that measure of review:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." 289 F.2d at 806.

In the instant case, the Second Circuit reversed the District Judge solely because there was no rational view of the evidence that would support an award of $305,000. Had the court viewed the award as being merely excessive in fact, because it questioned the validity of the petitioner's evidence, it would have been forced to affirm the District Judge's denial of the new trial motion on the ground that his action was taken within the scope of his discretion. But in the view of the Court of Appeals this verdict was excessive as a matter of law because there was no rational view of the evidence that could sustain it, and the refusal of the District Judge to set aside the verdict was accordingly not an act within the scope of his discretion. His ruling was therefore an abuse of discretion constituting an error of law, and it raised an issue upon which the

Court of Appeals had power to act.[7] *Neely* v. *Eby Const. Co., supra.*

B. Decisions of This Court Do Not Limit the Power of Appellate Courts To Review Denials of New Trial Motions and Remittiturs When Damages Are Excessive as a Matter of Law.

The petitioner argues that this Court has consistently held that an appellate court is wholly without power to review trial court action concerning the excessiveness of a verdict. The 1879 case which is cited as the first to meet this issue, *Railroad Co.* v. *Fraloff,* 100 U.S. 24, does not support the petitioner. In that case, as in others which the petitioner cites as specifically stating the constitutional limitation (Br. 7),[8] this Court merely made clear that the Seventh Amendment precludes an appellate court from determining on its own view of the facts that a verdict is excessive. These cases did not hold a court of appeals that views the facts in the light most favorable to the plaintiff, but nevertheless concludes that the verdict is excessive as

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[7] The petitioner argues that, should this Court uphold the established practice of the courts of appeals to review the motions here in question, it should allow them to reverse district judges only when the jury's damage award is monstrous. (Br. 19). He suggests, however, that an award is monstrous only if "all mankind must be ready to exclaim against [it], at first blush," and then contends that since the trial judge in the present case did not exclaim against the jury award at first blush it could not be monstrous.

Under this test no judge could ever be reversed, since by approving or rendering a particular award, the judge or jury being a part of "all mankind" would make the test inoperative. Petitioner's argument is therefore simply a re-statement of his basic position that the action of a trial court in denying a motion for a new trial based on the amount of the verdict is subject to no appellate supervision whatsoever.

[8] Wabash Ry. v. McD[illegible], 107 U.S. 454; Metropolitan R.R. v. Moore, 121 U.S. 558; L[illegible] Power, 151 U.S. 436.

a matter of law, cannot reverse a trial judge's denial of a motion for a new trial. Indeed, the *Fraloff* opinion itself draws the very distinction which the petitioner ignores:

> "[O]ur power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury . . . ." 100 U.S. at 31.

Moreover, in a case that followed the ones upon which the petitioner primarily relies, *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593, this Court marked a turning point in its attitude toward the Amendment. The Court held that a judgment *n.o.v.* could be entered consistently with the Seventh Amendment when the jury's answers to special interrogatories were inconsistent with the general verdict. The Court stressed the aim of the Amendment

> "is not to preserve mere matters of form and procedure but substance of right . . . . So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature . . . ." 165 U.S. at 596.

None of the post-*Walker* cases which the petitioner relies upon articulated a Seventh Amendment rationale. Some relied upon the limitations imposed upon appellate review by the writ of error,[9] while others dealt with review of cases decided in state courts, where, of course, there were no Seventh Amendment limitations upon lower appellate courts.[10]

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[9] Southern Ry. v. Bennett, 233 U.S. 80; Herencia v. Guzman, 219 U.S. 44.

[10] Louisville & N.R.R. v. Holloway, 246 U.S. 525; St.LouisI.M.& S.Ry v. Craft, 237 U.S. 648.

Thus, by the time of the decision in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, Mr. Justice Brandeis was justified in saying:

> "[The non-review rule's] early formulation . . . was influenced by the Judiciary Act of 1789, which provided in § 22 that there should be 'no reversal . . . on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on . . . the Seventh Amendment . . . . More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court." 287 U.S. at 481-82.

And *Fairmount* explicitly left open the propriety of reversing a district judge for an abuse of discretion. 287 U.S. at 485.

Only a few years later in *Dimick* v. *Schiedt*, 293 U.S. 474, this Court determined that a district judge did not have absolute discretion in denying new trial motions. In that case a court of appeals was affirmed for reversing a district judge's denial of a new trial when the district judge had done so because the defendant agreed to an additur of the plaintiff's damages. Mr. Justice Stone, although dissenting from the Court's disapproval of additurs, noted his agreement with its broadening of review of trial judge action:

> "If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome, even though no statute has authorized it." 293 U.S. at 489.

It is noteworthy that Mr. Justice Brandeis, the author of *Fairmount*, joined this dissent, as did Chief Justice Hughes and Mr. Justice Cardozo, and therefore welcomed the liberalization which petitioner claims was foreclosed by the *Fairmount* decision.[11]

Affolder v. *New York, C.&St.L.R.R.*, 339 U.S. 96, which upheld the district judge's denial of a new trial on the ground that the verdict returned by the jury was not "monstrous," indicates clearly that the Court was no longer willing to close its eyes to the possibility of appellate review of new trial motions. Then, in *Neese* v. *Southern Ry.*, 350 U.S. 77, which the petitioner cites as the capstone of his chain of authority dating from 1879, the Court assumed *arguendo* that the Constitution allows judicial review of denials of new trial motions and examined the record to determine whether the district judge had abused his discretion. *Neese*, therefore, made it quite clear that the authority of the Nineteenth Century cases was an open question.

The petitioner overlooks what is in fact the culmination of the line of authority that he has cited. In *Neely* v. *Eby Const. Co.*, 386 U.S. 317, one of the possible obstacles that stood in opposition to the power of a court of appeals to enter a judgment *n.o.v.* was that Federal Rule 50 guaranteed a party who had prevailed

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[11] The present statute governing appellate review provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

Neeley v. Eby Const. Co., 386 U.S. 317, 322, stressed the breadth of this provision.

before a jury the right to make a new trial motion, in the event a judgment *n.o.v.* was granted. Thus, if appellate courts had no power to grant such motions, they could not grant judgments *n.o.v.* This Court dealt at length with that issue and concluded that courts of appeals have ample power to grant or deny new trial motions:

> "Quite properly, this Rule [50(d)] recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question 'in the first instance' is lodged with the court of appeals." 386 U.S. at 323-24.
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> "In our view, therefore, Rule 50(d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the court of appeals . . . . [T]he court of appeals may make final disposition of the issue presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

If the courts of appeals have this power to grant or deny new trials, they should *a fortiori* have the power to exercise the limited review here in issue.

C. Pre-Seventh Amendment Precedent Does Not Support Petitioner's Argument.

The pre-Seventh Amendment common law practice that the petitioner discusses at length (Br. 12-13) does not lessen the force of the modern authority with respect to appellate action upon motions for new trials.

The petitioner's Seventh Amendment argument must turn ultimately on characterizing the King's Bench *en*

banc as acting in a trial court capacity when it entertained motions for a new trial and not in the appellate capacity which the petitioner admits it had to pass upon certain other matters. Thus the petitioner asserts that "the definitive point is that the motion was passed upon by the *same court* in which the action was begun and in which it was tried." (Br. 12) (emphasis his). This is true only in the most formal and abstract sense. As the petitioner admits, the motion for a new trial was not committed to the sole discretion of the trial judge but on the contrary was heard and decided by a panel of four judges sitting *en banc* at Westminster, which might or might not include the trial judge. (Br. 12).

Whether the Court of King's Bench sitting *en banc* was regarded in the 17th and 18th centuries as exercising trial or appellate power when it passed on motions for new trials is perhaps of historical interest, but is certainly irrelevant for present purposes. The characterization of that court does not touch the substance of the right that is protected by the Seventh Amendment, and as this Court has held that Amendment guaranteed the essentials of trial by jury and did not perpetuate all the forms and intricacies of procedure that existed at common law.[12] *Gasoline Prods Co.* v. *Chaplin Ref. Co.*, 283 U.S. 494, 498; *Galloway* v. *United States*, 319 U.S. 372, 390.

These essentials have been carefully articulated: That the jury be composed of 12 men; that trial to the jury be supervised by the court; and that the verdict of the jury be unanimous. *Patton* v. *United States*, 281 U.S. 276, 288; *United States* v. *Wood*, 299 U.S. 123,

[12] If common law practice did control, the modern rule most analogous to it would be that *only* federal courts of appeals could entertain new trial motions.

142. Appellate court review of a trial judge's refusal to order a new trial on the grounds of the excessiveness of the verdict has no impact on these essentials.

Nor does such review touch the fundamental "common-law distinction between the province of the court and that of the jury." *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 657. See also *Walker* v. *Southern Pac. R.R.*, 165 U.S. 593. Cf. *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 322. The petitioner seeks only to insulate rulings of lower courts from appellate courts with respect to matters that have always been committed to the courts.

By putting forward an interpretation of the Seventh Amendment that has nothing to do either with one of the essentials of trial by jury or with the fundamental distinction between the province of courts and juries, the petitioner ignores numerous modern holdings concerning appellate action on new trial motions. (I.B. *supra*). He also disregards the flexibility this Court has perceived in the Seventh Amendment in the many decisions that have sanctioned procedural reforms despite their lack of precise forebears in common law practice. *Gasoline Prods. Co.* v. *Chaplin Ref. Co.*, *supra*, (allowing partial new trials with respect to damages only); *Galloway* v. *United States*, *supra*; *Baltimore & C. Line* v. *Redman*, *supra*, (directed verdicts and judgments notwithstanding the verdict); *Walker* v. *Southern Pac. R.R.*, *supra*, (directed verdicts when answers to special interrogatories are inconsistent with the general verdict); *ex parte Peterson*, 253 U.S. 300, (auditors to make preliminary findings and reports).

Moreover, the petitioner is unable to cite any authority at common law with respect to judicial review of

remittiturs, since remittiturs themselves were virtually unknown prior to the adoption of the Seventh Amendment. *Dimick* v. *Schiedt,* 293 U.S. 474, 484, 494. It was, in fact, Mr. Justice Story, whose opinion in *Parsons* v. *Bedford,* 3 Pet. 433, the petitioner relies upon as setting forth an immutable principle of law under the Seventh Amendment, who in *Blunt* v. *Little,* Fed. Cas. No. 1,578 (C.C.D. Mass. 1822), initiated remittitur practice by a creative use of English common law precedent. To speak, therefore, of limitations which pre-Seventh Amendment common law practice lays upon review of remittiturs is to take the contradictory position of admitting sufficient flexibility under the Amendment for the development of remittiturs, while denying that flexibility with respect to their review.

D. No Considerations of Judicial Policy Support the Petitioner's Analysis of the Seventh Amendment.

The petitioner argues that sound judicial policy stands against allowing appellate review of district judges' decisions on remittiturs.[13] He raises the spectre of courts of appeals deciding cases by tenuous unrealities and argues that this Court would be swamped with review of these difficult decisions if it recognizes the appellate power claimed by the respondent here.

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[13] The petitioner cites as "the leading authority today" 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1302.1, at 355 (Rules ed. 1960), for the proposition that review of a trial judge's decision that a verdict is not contrary to the "clear weight of the evidence .... does not seem consistent with the Seventh Amendment." However, that treatise clearly distinguishes between new trials on grounds that a verdict is contrary to the weight of the evidence and issues involving the size of the verdict. *Id.* at 352. Moreover, another "leading" authority holds that the Seventh Amendment does not bar appellate review of new trial motions based upon the excessiveness of a jury award. 6A Moore, *Federal Practice* ¶ 59.08 [6], at 3827-28.

As pointed out earlier, p. 13 *supra,* all eleven federal Courts of Appeals have decided that some measure of review is needed over trial judges' refusals to order remittiturs or new trials when the jury has returned an excessive or an inadequate verdict. These decisions and the practice under them unequivocally refute the contention that the courts are or will be unable to administer the appellate power at issue in this case. And this Court through its certiorari policy has avoided painstaking factual reviews of damage awards. There is no reason to believe that its practice would be different in the future.

Moreover, having a wider perspective on damage cases generally than trial courts, the courts of appeals are especially well-suited for judging remittitur issues. Thus, in determining the question of law as to whether a jury's award is sustainable upon any reasonable view of the evidence, the courts of appeals can have useful recourse to the many other tort cases that have come before them.

Finally, the insulation of trial judges from appellate review might have adverse effects on areas of law in which this Court has relied upon new trial motions to limit the impact of excessive jury awards. See *e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 160.

II. THE DECISION BELOW IS NOT INVALID UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

The petitioner argues that even if it is assumed that the action of the court below was not prohibited by the Seventh Amendment its action is nonetheless invalid because appellate review under the FELA "is so narrowly limited that 'abuse of discretion' . . . is not an

authorized ground for appellate intervention." (Br. 22-25).[14]

To support this argument petitioner cites a line of cases that he asserts shows that "this Court has consistently reversed every appellate interference with a jury verdict, unless there was a complete absence of supporting evidence." (Br. 23). He then argues that the court below disregarded the teaching of these cases by "subjectively" determining that the amount of the verdict was excessive and by holding on that basis that the trial court had abused its discretion.

It should be observed at the outset that the cases cited by petitioner do not hold or even imply that the FELA enacts special rules of appellate procedure or imposes peculiar limitations upon the powers of appellate courts to review the action of trial courts. Indeed, it has been stated that "the system of judicial supervision still exists in [FELA] . . . as in other types of cases." *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 17 (Mr. Justice Douglas, concurring). It is significant that in five of the cited cases this Court reversed the appellate court for affirming the action of

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[14] Petitioner begins this argument by quoting the Court's statement in Dice v. Akron C. & Y. R.R., 342 U.S. 359, 363 that "the right to trial by jury is a 'basic and fundamental feature of federal jurisprudence'" and is "part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act." This general proposition does not advance petitioner's argument. His rights to a jury trial are no greater under the FELA than they are under the Seventh Amendment. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211. And we have shown in Part I above that the action of the court below did not violate the Amendment.

the trial judge.[15] These decisions do not draw any artificial distinction between the authority of appellate and trial courts, but on the contrary deal with the respective functions of court (whether trial or appellate) and jury under the FELA. It follows that these decisions and the argument that petitioner seeks to extract from them must be appraised in those terms, not in terms of some limitation upon appellate power as petitioner suggests.

The statements in the opinions cited by the petitioner should be read in context and with attention to the issue before the Court in those cases. All of these cases deal with the quantum of evidence required to establish substantive liability under the FELA. Although that Act speaks in terms of "negligence", it is now well recognized that the liability it imposes upon employers approaches the absolute. As the statute has been interpreted and applied by the courts, no showing of negligence in the historic sense is required, but on the contrary slight action or failure of action on the part of the employer is sufficient to establish substantive liability under the statute. Since little proof is required to establish liability, it is not surprising that the courts when dealing with the question of the amount of evidence required to support a verdict on liability have often said that a small amount of evidence will suffice to sustain a jury's verdict.

It does not follow, however, that these cases lay down any principle that the statute dispenses with the

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[15] Tiller v. Atlantic Coast Line R.R., 318 U.S. 54; Wilkerson v. McCarthy, 336 U.S. 53; Stinson v. Atlantic Coast Line R.R., 355 U.S. 62; Harrison v. Missouri Pac.R.R., 372 U.S. 248; Basham v. Pennsylvania R.R., 372 U.S. 699.

need for a rational relationship between the evidence and the amount of a verdict. The decisions of the courts interpreting and applying the statute so as to impose strict liability upon an employer rest upon a judicial determination that Congress intended that substantive liability imposed by the statute should not be qualified or cut down by common law doctrines relating to negligence or to the rights and obligations of masters and servants. But this Court has never held, and we submit that nothing in the statute would support a holding, that Congress intended the strict substantive liability imposed by the FELA on employers should be accompanied by the kind of unlimited accountability for damages for which petitioner contends. Indeed, if the matter were to be viewed as one of legislative policy, it might reasonably be assumed that strict or nearly absolute substantive liability does not diminish but instead increases the need for at least a limited degree of judicial control over the size of verdicts.[16]

If petitioner's argument were sound it could not be confined in its application, as petitioner seeks to do, to the power of appellate courts but would apply with equal logic and force as a limitation upon the power of trial courts in cases arising under FELA. The petitioner does not embrace this logical consequence of his argument and for good reason. This Court has recognized in cases arising under the FELA that the trial court has the authority to require a remittitur if it believes that a verdict is excessive as a matter of

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[16] State workmen's compensation plans frequently embody a schedule setting forth the precise damage recoveries that can be had for all possible work-related injuries. See *e.g.*, N.Y. Workmen's Compensation Law § 15.

law. *Union Pac. R.R.* v. *Hadley,* 246 U.S. 330, 334; *Neese* v. *Southern Ry.,* 350 U.S. 77.[17] Indeed, in the latter case this Court recognized that a court of appeals has the authority to order a new trial or a remittitur in any case in which the record would justify the conclusion that the trial court's failure to do so was an abuse of discretion.

We submit, therefore, that the decision of the Court of Appeals is not invalid under the FELA. In reviewing the action of the District Court, the court below applied a standard that was both rigorous and not inconsistent with the principles laid down in the decisions of this Court interpreting and applying the FELA.[18] Petitioner's argument to the contrary mis-

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[17] Lower federal courts and state appellate courts have frequently employed remittiturs in FELA cases. See Munson v. Long Is.R.R., 191 F. Supp. 748 (E.D.N.Y. 1961); Flusk v. Erie R.R., 110 F. Supp. 118 (D.N.J. 1953); Fornwalt v. Reading Co., 79 F. Supp. 921 (E.D. Pa. 1948); Jennings v. Chicago, R.I.&P.Ry., 43 F.2d 397 (D. Minn. 1930); Hammond v. Pennsylvania R.R., 15 F.2d 66 (W.D.N.Y. 1926), *aff'd,* 18 F.2d 1020 (2d Cir. 1927); Pitrowski v. New York, C.&St.L.R.R., 6 Ill. App. 2d 495, 128 N.E.2d 577 (1955); Thompson v. Jason, 265 S.W.2d 920 (Tex. Civ. App. 1954); Louisville & N.R.R. v. Stephens, 298 Ky. 328, 182 S.W.2d 447 (1944); Sibert v. Litchfield & M.Ry., 159 S.W.2d 612 (Mo. 1942).

[18] In suggesting that the court below should have applied a special standard of review since this case arose under the FELA, the petitioner ignores a consistent line of federal cases in which appellate courts reviewing FELA verdicts have applied the same standard that they would use in other civil cases. See Boston & Maine R.R. v. Talbert, 360 F.2d 286 (1st Cir. 1966); Russell v. Monongahela Ry., 262 F.2d 349 (3d Cir. 1958); Thomas v. Conemaugh & B.L.R.R., 234 F.2d 429 (3d Cir. 1956); Atlantic Coast Line R.R. v. Anderson, 267 F.2d 329, 333 (5th Cir. 1959), *cert. denied,* 361 U.S. 841; St. Louis S.Ry. v. Ferguson, 182 F.2d 949, 954-56 (8th Cir. 1950); Chicago R.I.&P.Ry. v. Kifer, 216 F.2d 753, 756-57 (10th Cir. 1954), *cert. denied,* 348 U.S. 917.

conceives and misstates the basis upon which the court below acted.

As the opinion of that court states, it applied the standard that it had previously enunciated in *Dagnello* v. *Long Island R.R.*, 289 F.2d 797 (1961). It accepted the ultimate facts established by the petitioner's evidence and it gave the judgment of the trial court and the petitioner "the benefit of every doubt". But having done this the court concluded that there was no evidence that in a rational manner could justify a verdict in excess of $200,000. In short, having resolved all doubts and inferences in favor of the petitioner and accepting all of his evidence, the court held that there could be no rational relationship between the evidence and a verdict of $305,000 and that accordingly the verdict was excessive as a matter of law.

When the petitioner argues that the FELA prohibits an appellate court from exercising this kind of limited review over the action of a trial court in denying a motion for a new trial on the ground that the verdict is excessive, he is in effect arguing that under the statute there need be no reasonable relationship whatsoever between the evidence and the amount of the verdict. Thus, petitioner's view of the law is that any injury no matter how small will justify any verdict no matter how large. We submit that the decisions of this Court do not require or sanction this result.

III. THE JURY'S $305,000 DAMAGE AWARD TO PETITIONER WAS ON THE UNDISPUTED FACTS IN THIS CASE EXCESSIVE, AND JUSTIFIED THE COURT OF APPEALS' ACTION IN ORDERING A REMITTITUR OR A NEW TRIAL.

In evaluating the jury's damage award, which exceeded by $55,000 the $250,000 demanded in the complaint, it is helpful at the outset to define precisely those elements of damage which are at issue. The petitioner claimed $27,000 for the wages he lost prior to trial. This sum, on the present appeal, raises no substantial question.

The two major elements of damage that raise the crucial issues now before the Court are those that the petitioner claimed for loss of future income and for the pain and suffering, past and future, which he claims has been and will be caused him by the injury.[19]

The basic facts with respect to petitioner's loss of future income due to his injury are clearly established. According to U.S. Life Tables, petitioner had a life expectancy at the time of trial of 27.5 years. (A.48). The petitioner states in his brief to this Court that he "has been totally and will be permanently disabled." (Br. 3, 25-26). However, the evidence was all to the contrary. For example, Dr. Cohen, the witness who the petitioner relied upon to establish the facts concerning his physical condition, had this to say:

> "The movement of all the toes is very bad, it is poor; and all in all he's got a poor functioning foot." (A.19).

* * *

[19] The Court should note that the petitioner did *not* allege that he bore the costs of the medical expenses incurred in his recovery. Thus, such costs sustain no part of the jury's award.

"Q. Is there any kind of work that you would recommend for a man with this type of disorder? A. I think a sedentary type job he should be safe, no one steps on his foot, if he keeps out of trouble.

"Q. A desk job in the railroad? A. Whoever has a desk job for him, I don't think it would make much difference, so long as he doesn't have to stand much and there is no chance of anyone stepping on his foot.

* * * * "Q. Well, what would your opinion be as to him working perhaps in some kind of capacity driving an automobile? Do you think he would be able to do that? A. I think he should be able to drive a passenger automobile, I wouldn't say a truck or anything like that." (A.23).

* * *

"Q. All I want to know now, Doctor, is, we are not faced with a man who is totally and completely disabled, are we? A. No, he can do sedentary work as I indicated." (A.24).

Thus, according to petitioner's own witness he was not totally disabled and would be able to maintain employment in a sedentary job or in a job that required him to drive an automobile. Indeed, the petitioner himself on direct examination testified that he had held a job for six months or a year prior to the trial. (A. 38-39). With this testimony from petitioner and his own witness, there was no basis in the record for the jury to award a sum for loss of future income on the ground that the petitioner was totally and permanently disabled.

Even assuming, however, that the petitioner never worked another day in his life, the maximum that the jury could have awarded for loss of future income

would be $100,000. The petitioner's income at the railroad was approximately $6,000 per year. (A. 48). The current yield on U.S. Treasury nine-month and one-year bills, virtually the safest and most liquid investment that can be had, has recently ranged from 5.663 percent to 6.086 percent. *The Wall Street Journal,* June 26, 1968, p. 25, col. 1. Thus, $100,000 placed in such an investment would yield approximately $6,000 per year.

Moreover, this income would accrue to the petitioner without any incursion into capital. Thus, at the end of his life he would have an estate of $100,000. The petitioner could not conceivably accumulate that sum while working for the railroad at his previous job or in any other foreseeable capacity.

The petitioner argues that his $6,000 per year salary would have increased in the future. Whatever weight this adds to the petitioner's case is more than offset by the consideration that living off the income of $100,000 allows him to keep that sum intact. The petitioner's argument is also offset by his testimony that he was able to secure employment prior to the trial and the testimony of his doctor that he was fit for future employment in various job capacities. Thus, $100,000 as compensation for loss of future income is extremely generous on this record.

To compare this figure with that actually awarded by the jury, the Court should consider that the $305,000 award given to the petitioner by the jury, invested at current short term government bond rates, would yield an annual income approaching $20,000 and allow him to pass an estate of nearly a third of a million dollars. If the petitioner chose not to maintain his capital intact,

he could, of course, have annual income substantially in excess of $20,000.

With $27,000 as a maximum figure for past lost wages and $100,000 as the maximum figure for loss of future income, the jury's award could be sustained only by holding that the pain and suffering that the petitioner has gone through and will go through justifies an award of $178,000. There is, of course, some evidence that the petitioner has had and will continue to have a certain measure of pain arising out of this injury. But not even the most favorable view of that evidence can justify an award of $178,000 as being reasonable compensation for the petitioner's pain and suffering.

The most persuasive item that the respondent can place before the Court is the testimony of the petitioner on direct examination as to the pain and suffering he has experienced. (A. 32-41). In summarizing, the petitioner stated:

> "Q. Now, you have indicated, as much as I feel it is necessary for you to, about the pain you have had in the foot. Has that pain been bearable so far as you are concerned up to the present time? A. Oh, yes. I mean, I just take it for granted now. It doesn't bother me now.
>
> "Q. And other than the increased discomfort that you have indicated in bad weather, has this pain up to now become much worse than it was before, or remained about the same? A. Remained about the same.
>
> "Q. Has it improved any? A. No, I don't think so." (A. 40-41).

This pain, changing with the weather, but now settled into a "bearable" (A. 40), "toothache"-like discomfort (A. 37) that the petitioner takes for granted,

might be compared to the pain of injuries such as football knee or tennis elbow that plague ex-athletes.[20] The jury gave him at least $178,000 for that pain. In doing so it rendered an award that was unsupportable upon any rational view of the evidence and the District Judge, therefore, erred as a matter of law in not setting it aside.

In determining the verdict that is reasonably supportable on the evidence in this case, it is useful to consider what other juries have awarded in similar cases and to consider the types of injuries that have been found by juries to justify the measure of recovery given to the petitioner in this case.

In an appendix to this brief the respondent has set forth a comprehensive summary of all decisions concerning damage awards returned against railroads and similar industries between May 1964 and April 1968, as collected in THE BULLETIN & THE CHRONICLE, a reporter published jointly by the American Association of Railroads and the National Association of Railroad Trial Counsel. The respondent invites the Court to examine this representative sample of awards to compare the $305,000 verdict which the petitioner in this case received for an injury to the toes on one foot with the awards returned both in similar and in vastly more serious cases. It is submitted that these decisions re-

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[20] Petitioner makes several ominous references to the possibility of future "amputation of the foot." (Br. 26, 27). Dr. Cohen did state that if the petitioner's pain became unbearable "the only thing to do is to remove a *portion* of the foot." (A. 19). (emphasis added). In view of the nature of the petitioner's injury, this testimony could refer only to an amputation of one or several toes. Moreover, the petitioner made it quite clear his pain was not unbearable (A. 40-41), and Dr. Cohen testified that the condition of the foot had improved at the time of trial. (A. 21-22).

veal that the jury's award in this case was grossly excessive.

Representative of cases where the plaintiff's injury was similar to or even more serious than the petitioner's are: *Kansas City So. Ry.* v. *Powell,* 411 S.W. 2d 633 (Tex. Civ. App. 1967) (FELA jury award of $76,000 to 44 year old fireman for functional loss of 50% of one leg); *Jones* v. *Chesapeake & O. Ry.,* 371 F.2d 545 (4th Cir. 1966) (FELA award of $97,660 for leg amputation and hip dislocation); *Miller* v. *Dewitt,* 208 N.E. 2d 249 (Ill. App. 1965) ($90,000 to one plaintiff for crushing of leg requiring insertion of permanent 6"-7" steel plate; $30,000 to co-plaintiff for fracture and impaction of heel resulting in permanent disability of foot). In none of the collected cases did a plaintiff receive an award approaching even the $200,000 recovery allowed by the Court of Appeals for an injury similar to the petitioner's.

There were only six cases in which the jury returned an award as high or higher than the petitioner's verdict here: *Henninger* v. *Southern Pac. Co.,* 59 Cal. Rptr. 76 (1967) ($650,000 for 29 year old conductor's loss of both legs above the knee, with evidence that he could never wear artificial limbs); *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (D.C. Cir. 1967) ($329,956 for wrongful death of 29 year old husband and father, Captain in U.S. Army); *Zaninovich* v. *American Airlines, Inc.,* 262 N.Y.S. 2d 854 (Sup. Ct. 1965) ($755,000 to four children for wrongful death of both parents, father 29 earning $14,900 per year); *Thill* v. *Modern Erecting Co.,* 136 N.W. 2d 677 (Minn. 1965) ($642,400 to paraplegic; reduced by trial court to $375,000); *Robertson* v. *Rig-A-Lite Co.,* 394 S.W. 2d 838 (Tex.

Civ. App. 1965) ($500,000 to 31 year old man for loss of both hands and one leg); *Jines* v. *Greyhound Corp.*, 197 N.E. 2d 58 (Ill. App. 1964) ($400,000 for 21 year old father of two left completely paralyzed in lower extremities and nearly completely paralyzed in upper extremities).

CONCLUSION

The decision of the Court of Appeals that the petitioner must enter a remittitur of his verdict insofar as it exceeded $200,000 or face a new trial was correct. It rested upon a standard of review that is consistent with both the Seventh Amendment and the FELA. On the facts of this case, this standard was correctly applied. The District Judge erred as a matter of law, and thereby abused his discretion, in refusing to set aside the $305,000 verdict of the jury, there being no evidence, even when the petitioner was given the benefit of every doubt, that on any rational view could sustain that verdict.

The decision below should therefore be affirmed.

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APPENDIX

Set forth below are cases collected from the May 1964 to April 1968 editions of THE BULLETIN & THE CHRONICLE, a reporter published jointly by the Association of American Railroads and the National Association of Railroad Trial Counsel. These cases represent what the respondent believes to be a complete list of all cases reported in that publication which describe a plaintiff's injury and state the damage award. The cases are listed in the order in which they appear in the volumes of the publication.

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Oberski v. *New Haven Gas Co.*, 197 A.2d 73 (Conn. 1964). $50,000 for burns over 20% of 42-year-old plaintiff's body and $10,000 for special damages were not excessive.

Jines v. *Greyhound Corp.*, 197 N.E.2d 58 (Ill. App. 1964). $400,000 not excessive for damages to 21-year-old father of two children who was completely paralyzed in the lower extremities and almost completely paralyzed in the upper extremities.

Edmiston v. *Kupsenel*, 135 S.E.2d 777 (Va. 1964). $28,500 not excessive for severe head injuries, fractures of two ribs, and back injury to 51-year-old plaintiff.

Duncan v. *Smith*, 376 S.W.2d 877 (Tex. Civ. App. 1964). $175,000 excessive in amount over $114,000 for extensive third degree burns to plaintiff's face and body.

Dindo v. *Grand Union Co.*, 331 F.2d 138 (2d Cir. 1964). $12,500 not excessive for injury sustained when a can of beans fell 18 inches from store display and struck the plaintiff on the shoulder causing contusions.

Meagher v. *Garvin*, 391 P.2d 507 (Nev. 1964). $125,107.60 to a 58-year-old woman who suffered a leg fracture which left her leg 2½ inches shorter, and $17,500 to her husband who suffered broken ribs and loss of his wife's services were not excessive.

Adair v. *Northern Pacific Ry.*, 392 P.2d 830 (Wash. 1964). $13,750, less 40% for contributory negligence,

awarded in FELA action where employee slipped and fell on ice.

Van Slyke v. *New York Central R.R.*, 249 N.Y.S.2d 462 (App. Div. 1964). $60,000, reduced to $45,000 because of contributory negligence, was excessive for a herniated-disc back injury where plaintiff's lost time was approximately two weeks.

Watson v. *Wilkinson Trucking Co.*, 136 S.E.2d 286 (S.C. 1964). $40,000 not excessive for 27-year-old plaintiff who suffered ruptured disc and aggravation of a pre-existing hip condition.

Coffman v. *St. Louis-San Francisco Ry.*, 378 S.W.2d 583 (Mo. 1964). $270,000 held excessive by $50,000, where 16-year-old plaintiff suffered severance of his spinal cord, causing complete paralysis of the lower extremities, almost complete paralysis of the upper, and an inability to control bladder and bowels.

Jenkins v. *Associated Transport, Inc.*, 330 F.2d 706 (6th Cir. 1964). $100,000 not excessive for severe burns and multiple fractures to 36-year-old plaintiff.

Royal Indemnity Co. v. *Magee*, 331 F.2d 595 (5th Cir. 1964). $45,000 held not excessive to woman, four months pregnant, who suffered severe facial lacerations and "psychoneurotic reactions."

Breckir v. *Lewis*, 251 N.Y.S.2d 77 (App. Div. 1964). $75,000 excessive by $40,000 for wrongful death of plaintiff's 21-year-old daughter.

Joe Rone Grain Co. v. *McFarland*, 381 S.W.2d 220 (Tex. Civ. App. 1964). $22,094 to a 21-year-old man who suffered severe whiplash was not excessive.

Direct Transport Co. of Fla. v. *Rakaskas*, 167 So.2d 623 (Fla. App. 1964). $290,000 not excessive for multiple fractures to plaintiff's pelvis, rendering him "unable to control many of the normal body functions or [to] perform as a normal human being."

Calhoun v. *Hildebrandt*, 40 Cal. Rptr. 690 (Cal. App. 1964). $3,500 not inadequate despite fact that medical and hospital expenses and wage loss amounted to more than $3,988.

Olson v. *Siorpia,* 130 N.W.2d 827 (Wisc. 1964). $25,000 held excessive for fractured right femur of 86-year-old female plaintiff.

Pitts v. *Greene,* 382 S.W.2d 904 (Ark. 1964). $40,000 held not excessive for mental anguish of both parents for wrongful death of 17-year-old daughter.

Dowd v. *Webb,* 337 F.2d 93 (3d Cir. 1964). $18,677 not inadequate for loss of sight of one eye, nose fracture and other injuries.

Francis v. *Barnes,* 130 N.W.2d 683 (Iowa 1964). $22,500 not excessive for disc injury to 59-year-old woman.

Zawoyski v. *Pittsburgh Railways Co.,* 204 A.2d 463 (Pa. 1964). $15,000 not excessive to fireman who was injured in chest and hip.

Farrow v. *Cundiff,* 383 S.W.2d 119 (Ky. 1964). $700 not inadequate for injury to an unemployed woman.

Shupe v. *New York Central System,* 339 F.2d 998 (7th Cir. 1965). $121,444 held excessive for shoulder injury to male plaintiff.

Derewecki v. *Pennsylvania R.R.,* 36 F.R.D. 195 (W.D. Pa. 1964). $30,000 for injury during lifetime of employee and $50,000 for benefit of widow and children for his death were not excessive when deceased suffered extreme pain and two myocardial infractions.

Caldwell v. *Shoptaw,* 385 S.W.2d 799 (Ark. 1965). $24,000 not excessive for neck and back injuries to a 41-year-old married woman.

VOLUME 50

Matta v. *Welcher,* 378 S.W.2d 265 (Mo. App. 1965). $8,000 for injury to foot creating the possibility of arthritis required a remittitur of $4,000.

Ganotis v. *New York Central Ry.,* 342 F.2d 767 (6th Cir. 1965). $30,000 in a FELA action, reduced by 50% for contributory negligence, where mail bag struck employee.

Colorado & So. Ry. v. *Lombardi,* 400 P.2d 428 (Colo. 1965). $12,000 for severe injuries to employee's foot caused when door fell upon it.

City of Houston v. *Moore,* 389 S.W.2d 545 (Tex. Civ. App. 1965). $47,200 not excessive for cervical laminectomy injury.

Sharpe v. *Steel,* 208 A.2d 43 (Pa. Sup. 1965). $1,800 held inadequate for neck injury to male plaintiff.

Currie v. *Fiting,* 134 N.W.2d 611 (Mich. 1965). $32,778 to parents for wrongful death of their 21-year-old daughter.

Pierce v. *Mowry,* 210 A.2d 484 (N.H. 1965). $6,581 held excessive by $3,000 for death of a 13-year-old deaf mute with cerebral palsy.

Knotts v. *Valocchi,* 207 N.E.2d 379 (Ohio 1963). $42,000 not excessive for permanent injuries requiring 27 days hospitalization.

Shaw v. *Texas & Pacific Ry.,* 170 So.2d 874 (La. 1965). $50,000 awarded in FELA action for wrongful death.

Whittaker v. *Cole,* 390 S.W.2d 893 (Ky. 1965). $25,000 not excessive for two fractured legs of 51-year-old garage owner who was receiving a 40% disability pension.

Kodack v. *Long Island R.R.,* 342 F.2d 244 (2d Cir. 1965). $100,000 for back injuries upheld.

Newman v. *Dalton,* 141 S.E.2d 677 (Va. 1965). $40,000 not excessive for fractured skull and hip socket of 70-year-old male plaintiff.

Nicholson v. *Blanchette,* 210 A.2d 732 (Md. 1965). $20,000 for injuries to 59-year-old female plaintiff and $15,000 awarded plaintiff's husband for loss of consortium.

Mayer v. *Sampson,* 402 P.2d 185 (Colo. 1965). $1,787 and $4,500 held not excessive for injuries to leg, neck and back.

Drosch v. *Kato,* 400 P.2d 8 (Ore. 1965). $93,000 held not excessive for injuries to 54-year-old longshoreman who suffered permanent injury to internal organs (removal

of about one-half of left colon), hernia and lame back and neck.

Braswell v. *New York, C. & St. Louis R.R.*, 208 N.E.2d 358 (Ill. App. 1965). $65,000 held not excessive for compressed fracture of first lumbar vertebra and compression deformity of second lumbar vertebra.

Sodergren v. *Goodman*, 242 F. Supp. 44 (E.D.S.C. 1965). $10,500 awarded 38-year-old unmarried woman for general body soreness and severe headaches.

Miller v. *DeWitt*, 208 N.E.2d 249 (Ill. App. 1965). Three employees awarded $90,000 (for "crushing" of right leg, fracture of eight ribs and two vertebrae, with leg requiring a permanent 6" - 7" steel plate), $30,000 (for fracture of left heel, causing impaction and resulting in permanent disability of left foot), and $5,000 (for lacerations and sprains) for injuries suffered when roof collapsed.

Stiles v. *Gove*, 345 F.2d 991 (9th Cir. 1965). $31,728 awarded for wrongful death of 52-year-old woman when stagecoach overturned.

Young v. *Hearin Tank Lines*, 176 So.2d 790 (La. App. 1965). $52,814 for injuries to employee's eyes when creosote splashed into them, held not excessive.

Deemer v. *Reichart*, 404 P.2d 174 (Kan. 1965). $23,950 for dislocation and comminuted fracture of hip, requiring 51 days in traction, causing phlebitis, and rendering plaintiff unfit for prior employment, held not excessive for 42-year-old man.

Fairbanks v. *Yellow Cab Co.*, 346 F.2d 258 (7th Cir. 1965). $30,000 not excessive for cervical injury to corporation executive.

Johnson v. *Colglazier*, 348 F.2d 420 (5th Cir. 1965). Husband (back injury) and wife (fractured vertebra, crushed ankle and rib injuries) awarded $24,486 and $46,220 respectively for injuries received in traffic accident. Reversed on other grounds, but held not excessive *per se*.

Underwood v. *Pennsylvania R.R.*, 210 N.E.2d 347 (Ill. App. 1965). $55,000 for permanent eye injury when debris blew in employee's eyes.

Zaninovich v. *American Airlines,* 262 N.Y.S.2d 854 (Sup. Ct. 1965). $755,000 damages held not excessive for the death of both parents of four children (father 29, earning $14,900 per year; mother 28).

Thill v. *Modern Erecting Co.,* 136 N.W.2d 677 (Minn. 1965). $642,400 to man left paraplegic by construction accident reduced to $375,000 by trial court.

Movible Offshore Co. v. *Ousley,* 346 F.2d 870 (5th Cir. 1965). $115,000 to construction employee for leg injury resulting in 40% loss of effective use of knee joint was generous but not excessive.

Marmo v. *Chicago, R.I. & P.R.R.,* 350 F.2d 236 (7th Cir. 1965). $160,000 held not excessive for loss of hand of 38-year-old railroad machinist.

Galloway v. *Atlantic Coast Line Railroad Co.,* 242 F. Supp. 211 (E.D.S.C. 1965). $50,000 to 59-year-old railroad car inspector for injuries that disfigured the plaintiff and left him "an obvious cripple for the remainder of his life."

Poe v. *Pittman,* 144 S.E.2d 671 (W. Va. 1965). $10,000 damages not excessive for fractures to arm and leg of lineman.

Hook v. *Dubuque,* 214 A.2d 377 (Conn. 1965). $7,500 not excessive for two years of recurring headache pain.

Hurtig v. *Bjork,* 138 N.W.2d 62 (Ia. 1965). $28,000 to parents of six-year-old girl for her wrongful death; remittitur of $16,000.

Robertson v. *Rig-A-Lite Co.,* 394 S.W.2d 838 (Tex. Civ. App. 1965). $500,000 not excessive to 31-year-old man who lost both hands and one leg.

Teegarden v. *Dahl,* 138 N.W.2d 668 (N.D. 1965). $12,500 for plaintiff's injuries and $17,500 for her husband's wrongful death.

Russell v. *Gulf, M. & O. RR.,* 397 S.W.2d 583 (Mo. 1965). $45,000 to car-man helper held excessive by $25,000 for permanent injuries to back muscles.

Brown v. *Marker,* 410 P.2d 61 (Okla. 1965). $50,000 held not excessive for facial scar and leg abnormalities to 5-year-old girl.

Fort Worth & D. Ry. v. *Coffman,* 397 S.W.2d 544 (Tex. Civ. App. 1965). $160,000 held not excessive for head injuries incapacitating plaintiff from employment as a conductor who had earned $9,000 per year and causing imbalance and an inability to walk normally.

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Bridger v. *Union Ry.,* 355 F.2d 382 (6th Cir. 1966). $60,000 for loss of one leg.

Atlantic Coast Line R.R. v. *Braz,* 182 So.2d 491 (Fla. App. 1966). $185,000 for wrongful death of wife and $40,000 for wrongful death of daughter, upheld with remittitur of $25,000 with respect to death of wife.

Goodman v. *Terminal Railroad Ass'n of St. Louis,* 215 N.E.2d 457 (Ill. App. 1966). $125,000 award for injury which left employee permanently crippled; trial court ordered $45,000 remittitur.

Holfester v. *Long Island R.R.,* 360 F.2d 369 (2d Cir. 1966). $250,000 for extensive first, second and third degree burns from middle of body down extremities, causing permanent and serious disability.

Boston & Maine R.R. v. *Talbert,* 360 F.2d 286 (1st Cir. 1966). $113,780 held not excessive in FELA action for wrongful death.

McDonald v. *Missouri-Kansas-Texas R.R.,* 401 S.W.2d 465 (Mo. 1966). $38,541 held not excessive in FELA action for fracture of base of skull which rendered plaintiff "industrially unemployable" for the remainder of his life (40.7 year expectancy).

McLaughlin v. *Chicago, M., St. P. & P. Ry.,* 143 N.W.2d 32 (Wisc. 1966). $4,000 to priest whose injuries required several hospitalizations held inadequate. Court ordered defendant to consent to award of $15,000. Additional award of $12,500 for impairment of professional duties upheld.

Hollis v. *Terminal R.R. Ass'n,* 218 N.E.2d 231 (Ill. App. 1966). $175,000 for back injuries requiring laminectomy reduced to $125,000.

Cutter v. *Cincinnati Union Terminal Co.*, 361 F.2d 637 (6th Cir. 1966). $60,000 for injury to foot in FELA action.

Parker v. *Reading Co.*, 363 F.2d 608 (3d Cir. 1966). $100,000 for wrongful death of husband; reversed on other grounds.

Lehigh Valley R.R. v. *American Smelting & Ref. Co.*, 256 F. Supp. 534 (E.D. Pa. 1966). $22,500 for wrongful death.

Brogdon v. *Southern Railway*, 253 F. Supp. 676 (E.D. Tenn. 1966). $20,000 jury verdict awarded widow of industry employee killed on job.

Waller v. *Southern Pacific Co.*, 54 Cal. Rptr. 421 (Cal. App. 1966). $35,000 FELA award to train dispatcher who was allowed to return to work by railroad doctor, thus aggravating his arteriosclerosis.

New Orleans & N. R.R. v. *Thornton*, 191 So.2d 547 (Miss. 1966). $150,000 for wrongful death of 44-year-old housewife who died of breast cancer caused by accident; held excessive, remittitur of $35,000 ordered.

American National Bank & Trust Co. v. *Pennsylvania R.R.*, 219 N.E.2d 529 (Ill. 1966). $275,000 to boy, 13, for loss of both legs.

Seiferth v. *St. Louis S. Ry.*, 368 F.2d 153 (7th Cir. 1966). Boy, 16, awarded $48,000 and father $7,000 for loss of boy's leg; reversed on other grounds.

Edwards v. *Passareli Bros. Automotive Service, Inc.*, 8 OS(2d) 6 (Ohio 1966). $10,000 for injuries in collision.

Blackburn v. *Aetna Freight Lines*, 368 F.2d 345 (3d Cir. 1966). $80,000 for wrongful death of husband.

McCann v. *Smith*, 370 F.2d 323 (2d Cir. 1966). $50,000 for permanent injuries suffered when engineer assaulted in railroad bunkroom.

Vandaveer v. *Norfolk & Western Ry.*, 222 N.E.2d 897 (Ill. App. 1966). $40,000 verdict for injuries and consequent ulcer caused by assault upon female employee.

Minton v. *Southern Ry.*, 368 F.2d 719 (6th Cir. 1966). $10,000 for wrongful death of 72-year-old woman.

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Budd v. *Erie L. R.R.*, 225 A.2d 171 (N.J. 1966). $58,500 for death, $6,000 for pain and suffering in FELA action.

Bonastia v. *Terminal R.R. Ass'n*, 409 S.W.2d 122 (Mo. 1966). $50,000 in FELA action for death of employee.

Mixon v. *Atlantic Coast Line R.R.*, 370 F.2d 852 (5th Cir. 1966). $81,532 for limb amputations.

St. John's River Terminal Co. v. *Vaden*, 190 So.2d 40 (Fla. App. 1966). $90,500 to employee whose foot was amputated.

Kansas City So. Ry. v. *Powell*, 411 S.W.2d 633 (Tex. Civ. App. 1967). $80,000 to 44-year-old fireman for functional loss of 50 percent of leg required remittitur of $12,000.

Louisville & N.R.R. v. *Wade*, 195 So.2d 101 (Ala. 1967). $5,000 for two broken ribs.

Chicago, R.I. & P.R.R. v. *Hawes*, 424 P.2d 6 (Okla. 1967). $30,000 to employee who suffered ankle injury and had lost $8,000 in past wages and presented disputed evidence of future disability.

Missouri Pacific R.R. v. *Hesse*, 417 S.W.2d 379 (Tex. Civ. App. 1967). $71,170 for fractures of leg and pelvis, compensating plaintiff for past and future pain and suffering, loss of earnings, impairment of future earnings and medical expenses.

O'Brien v. *Great No. R.R.*, 421 P.2d 710 (Mont. 1966). $204,000 to wife and minor children of driver killed in crossing accident.

St. Louis S. Ry. v. *Farrell*, 416 S.W.2d 334 (Ark. 1967). $70,000 for wrongful death of mother and mental anguish to children, ages 44, 47 and 50, held excessive by $20,000.

Seaboard Air Line R.R. v. *Gay*, 201 So.2d 238 (Fla. App. 1967). $80,000 to mother who suffered mental anguish due to death of 12-year-old daughter in train-auto collision held not excessive.

Jones v. *Chesapeake & Ohio Ry.*, 371 F.2d 545 (4th Cir. 1966). $97,660 for plaintiff's leg amputation and hip dislocation.

Bartholomay v. *St. Thomas Lumber Co.*, 148 N.W.2d 278 (N.D. 1966). $32,000 to 22-month-old girl and 3-year-old boy for wrongful death of mother held not excessive.

Del Raso v. *Elgin, J. & E. Ry.*, 228 N.E.2d 470 (Ill. App. 1967). Awards ranging from $3,000 to $14,500 in favor of four carmen due to lead poisoning which caused nausea, leg and stomach pains, and loss of appetite.

Flaherty v. *Pennsylvania R.R.*, 231 A.2d 179 (Pa. 1967). $30,000 for fall which "shattered" clavicle and knocked plaintiff unconscious.

Western Ry. of Ala. v. *Brown*, 196 So.2d 392 (Ala. 1967). $14,213 to passenger who sustained injuries to leg aggravating varicosities.

Jehl v. *Southern Pac. Co.*, 427 P.2d 988 (Cal. 1967). $100,000 to 19-year-old brakeman who had right leg amputated below knee and osteomyelitis in left leg held inadequate; case remanded for additur.

Henninger v. *Southern Pac. Co.*, 59 Cal. Rptr. 76 (Cal. App. 1967). $650,000 to 29-year-old conductor who lost both legs above the knee and presented evidence that he could never wear a functional prosthesis and would, therefore, require a full-time attendant throughout the rest of his life.

Chesapeake & O. Ry. v. *Biliter*, 413 S.W.2d 894 (Ky. 1967). $18,600 to parents allegedly dependent upon son, 44, killed in train wreck found excessive to the extent exceeded $13,750.

Wells v. *Gulf Mobil & O. R.R.*, 266 N.E.2d 662 (Ill. App. 1967). $75,000 FELA award to 39-year-old pipe fitter who injured back and who worked only 3 days in 22 months following last employment held not excessive.

Cox v. *Northwest Airlines, Inc.*, 379 F.2d 893 (D.C. Cir. 1967). $329,956 for wrongful death of husband and father, who at age 29 had projected future income of between $15,000 and $20,000, held excessive on the

ground that the award was not discounted to present value.

Dixon v. *Pennsylvania R.R.*, 378 F.2d 392 (3d Cir. 1967). $4,000 for injury that allegedly prevented plaintiff from climbing or lifting heavy objects held not inadequate.

Brogdon v. *Southern Ry.*, 384 F.2d 220 (6th Cir. 1967). $20,000 to surviving widow.

Brooks v. *United States*, 273 F. Supp. 619 (D.S.C. 1967). $200,239 for wrongful death of man 33, survived by wife and 3 children.

Atlantic Coast Line R.R. v. *Daugherty*, 157 S.E.2d 880 (Ga. App. 1967). $62,767 in FELA action for wrongful death.

Houston B. & T. Ry. v. *Weingarten*, 421 S.W.2d 431 (Tex. Civ. App. 1967). $51,749 for wrongful death.

Kaufman v. *Miller*, 414 S.W.2d 164 (Tex. 1967). $25,000 for disabling nervous disorder caused by injury.

Gaddy v. *Louisville & N.R.R.*, 386 F.2d 772 (6th Cir. 1967). $100,500 to widow and two minor children.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1172 35

CARL F. GRUNENTHAL,
Petitioner

v.

THE LONG ISLAND RAIL ROAD COMPANY
Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF CITATIONS

PETITIONER'S REPLY BRIEF

In its Brief, Respondent has not adopted the position taken by the court below and other Courts of Appeals on the constitutional question involved and the subsidiary issues raised. Some of the novel assertions there made necessitate the filing of this Brief.

I.

(a) Its argument on the constitutional issue here raised is based upon its conclusion that it is controlled by *Neely v. Eby Const. Co.*, 386 U.S. 317 (1967). The basic fallacy of this argument has already been laid bare in our principle Brief. Simply stated, it is that appellate review of the entry of a judgment n.o.v., or the failure to do so, is purely and simply a question of law; review of the grant or refusal of a new trial for excessiveness is purely and simply a question of fact. *Neely* and its precursors (*Baltimore & C. Line v. Redman*, 295 U.S. 654, 658 (1935); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); cf. *Galloway v. United States*, 319 U.S. 372 (1943)) proceed upon the acknowledged principle that review of a question of law is not within the prohibition of the Seventh Amendment. None of these decisions, nor any other decision of this Court, has approved the review of any question of fact. Absent acceptance by this Court of the *Dagnello* view that "abuse of discretion" can be converted in some way to a question of law, Respondent's argument lacks even the appearance of validity.

Respondent blandly states (Br. 10) that "the standard applied by appellate courts in reviewing remittiturs is precisely that used by them in reviewing judgments n.o.v." This statement is completely erroneous and unsupportable. The standard for reviewing or for entering judgment n.o.v. is whether there is any evidence at all to support the verdict; the standard which the Courts of Appeals have been using (and that ostensibly used by the court below) is whether the trial judge abused his discretion.

Respondent carries this argument further (Br. 12) by stating that "the similarity between the issues of the sufficiency of evidence to sustain a finding of liability and the sufficiency of evidence to justify a particular damage award is readily apparent." Not only is any such similarity not apparent, it is non-existent. On the contrary, determination of the validity of a damage award is precisely similar to determination of the weight of the evidence. And the approval by this Court of the principle that appellate courts may review the quantum of an award must require approval of a similar right to review the weight of the evidence in every case.

Another completely illogical non-sequitur is Respondent's argument that *Neely*, by recognizing the power of the Courts of Appeals to grant new trials where legal errors have been committed, concedes their power to grant new trials upon review of the weight of the evidence or the quantum of the verdicts. The right to reverse for legal error cannot, by some type of inverse logic, imply the power to review facts found by a jury.

(b) Respondent also argues that the pre-Amendment practice in England of considering motions for new trial by the court en banc is justification for appellate review of jury findings of fact. We have reviewed all of the early English cases cited by the authorities noted in our principle brief (Br. 12-15) and have been unable to find a single case in which a new trial was granted because the verdict was against the weight of the evidence or the damages were excessive in which the trial judge did not sit upon the motion. The conclusion reached by *Barron & Holtzoff* (§1301.1, page 355) is justifiable; "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified, and even then, only if he could persuade his brethren at Westminster to this view."

The Court here is not faced with a question of procedural reform which may proceed upon some flexible construction of the Amendment as is suggested by Respondent

(Br. 21). It is asked to restate the basic principles that issues of fact are not subject to review and that the quantum of a jury verdict is an issue of fact. In our original Brief we have demonstrated that both principles have been firmly established by this Court (Br. 5-9).

Does not the Respondent's position boil down to a single proposition: that the quantum of a jury verdict may be converted into a question of law by some legal legerdemain? Why the quantum of the verdict and not the quantum of the evidence? If the reviewing court may not reduce a verdict because it would not have awarded more than some smaller amount (which it concededly cannot do), what greater power can it take by rephrasing its holding to read that it cannot "arrive at a sum in excess of" some smaller amount?

(c) If the court below had the constitutional power to re-examine "the fact tried by a jury" was its re-examination based on a proper standard? Although it set up as its standard "abuse of discretion of the trial judge", decreed by its earlier opinion in *Dagnello*, it ignored this standard in deciding the case. In its place, it examined the verdict subjectively and the majority of two judges concluded: "we cannot in any rational manner . . . arrive at a sum in excess of $200,000." The characterization of the verdict in this case by the court below as one which it could not "arrive at" is a far weaker criticism than that made by the Fourth Circuit in *Neese* (216 F. 2d 772, 776). There it was said that the verdict was "far beyond the pale of any reasonable probability and entirely without support in the record."

Finally, let us juxtapose what the court below did with what the Seventh Amendment says:

". . . (W)e cannot in any rational manner . . . arrive at a sum in excess of $200,000." (A. 66)

". . . (N)o fact tried by a jury, shall be otherwise re-examined . . . than according to the rules of the common law."

All of Respondent's argument to the contrary notwithstanding, it is apparent that the court below here "reexamined" a "fact tried by a jury". The single constitutional question involved is whether it had the power to do so.

II.

In our original Brief we have demonstrated that the argument that review of the discretion of the trial judge is a question of law is indefensible. Respondent's Brief apparently concedes the point since it makes a studied attempt to avoid this issue and to bring the decision of the court below within the narrow limit of the scope of review which might remotely be thought to be sanctioned by *Neese*. Unfortunately for Respondent, the majority below made no attempt to review the evidence supporting the amount of the verdict in order to determine whether it is "without support in the record". At no point does it even attempt to demonstrate any error in the trial judge's evaluation of the evidence (A. 56, 57). The fact is otherwise. The court below makes clear (and Respondent elsewhere concedes, Brief 13-14) that it has applied the rule which it had established in *Dagnello* that remittitur may be directed for "abuse of discretion". This criterion had been rejected by the court below (following *Neese*) in *Caskey v. Village of Wayland*, 375 F. 2d 1004 (1967), and even its application to the instant case is denied by Judge Hays, dissenting (A. 67). Petitioner's Brief on the Merits has considered this question at length.

For the record we must also challenge Respondent's statement (Br. 27) that this Court in *Neese* recognized the authority of a Court of Appeals to order a new trial for excessiveness on the ground that the trial court's failure to do so was an abuse of discretion. Not a word there said can justify any such conclusion.

III.

Respondent attempts to read *Railroad Co. v. Fraloff*, *Wabash Ry. v. McDaniel*, *Metropolitan R. R. v. Moore* and *Lincoln v. Power* as precluding "an appellate court from determining on its own view of the facts that a verdict is excessive" but not so precluding review if it "views the facts in the light most favorable to the plaintiff, but nevertheless concludes that the verdict is excessive as a matter of law" (Br. 15-16). This is not only pure sophistry but exhibits gross misinterpretation of the clear language of this Court.

Did the trial judge err in finding, from a careful study of the record and his observation of the plaintiff and his witness, that the verdict has *some* support in the record? Nowhere does the Respondent's Brief address itself to this question. Nowhere does the opinion of the majority below do so. Respondent's Brief (Br. 29-33) lends no weight to that opinion for it reads the evidence in the light *least favorable to the petitioner*. At no point does it even attempt to demonstrate error in our evaluation of the evidence supporting the trial judge's view (Br. 25-28). Neither the opinion nor the Brief attempts an objective consideration of the damages. Both fall prey to the basic fault of viewing the verdict subjectively. The majority below says: "we cannot . . . arrive at a sum in excess of $200,000." (A. 66). Is this any more than saying "if we had tried this case, we would not have awarded more than $200,000?" How diametrically opposed is this even to the *Neese* test (?) which prohibits subjective review and would allow only the question whether the verdict and the trial court's action are without any support in the record.

Respondent's argument that $100,000 is the "maximum that the jury could have awarded for loss of future income" (Br. 26-27) is sheer nonsense. It assumes to fix petitioner's income for the next 27½ years at $6,000; it

ignores the evidence of past, and the probability of future, wage increases; it shuts its eyes to the possibility of overtime work and promotions. It makes to this Court the argument which it might have made to the jury if it had asked at the trial for a verdict not exceeding $200,000.

Its further argument as to the interest rate obtainable on the entire verdict is sophomoric. Its counsel know as well as do all others dealing with this and any other physical injury case that the law does not base a lump-sum award for pain, suffering, inconvenience and embarrassment on the annual amount which the award will yield when invested. The proposition it puts forth has no more validity than that used before juries in some cases (not in this one) that the award should be based on a per diem allowance: 32 years—11,680—250,320 hours at $1 per hour or $250,320 for pain alone, allowing nothing for the loss of the right to enjoy a normal life.

Equally lacking justification is the recitation of verdicts in other cases in its Brief and the Appendix thereto. The age of the computer has not (as yet) made the comparison of verdicts in other cases a factor in judging the quantum of a verdict. If it ever should, a review of the entire record in each such case will be required.

Almost 40 years ago Dean Leon Green, in "Judges & Jury" (1930), discussed in some detail the manner in which the growth of appellate power had, by innumerable devices, substantive and procedural, taken over control of jury trials. His comment at that time is still pertinent to any consideration of the extension of this power by the Court.

> "In brief, the extravagant pains we take to preserve the integrity of jury trial in final analysis are completely counteracted in the more extravagant provisions which we make for appellate review, together with the remarkable technique appellate courts have

developed for subjecting every phase of trial to their own scrutiny and judgment." (at p. 391).

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1968.

Carl F. Grunenthal, Petitioner, v. The Long Island Railroad Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 18, 1968.]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioner was working for respondent as foreman of a track gang when a 300-pound railroad tie being lifted by the gang fell and severely crushed his right foot. He sued respondent for damages under the Federal Employers Liability Act, 45 U. S. C. § 51 *et seq.*, and a jury in the District Court for the Southern District of New York awarded him $305,000.[1] The trial judge denied the railroad's motion to set the award aside as excessive. The railroad appealed the denial to the Court of Appeals for the Second Circuit, and that court, one judge dissenting, ordered the District Court to grant the railroad a new trial unless the petitioner would agree to remit $105,000 of the award. 388 F. 2d 480 (1968). We granted certiorari, 391 U. S. 902 (1968).[2] We reverse.

Petitioner argues that the Court of Appeals exceeded its appellate powers in reviewing the denial of the rail-

[1] Petitioner's complaint sought damages of $250,000. This was amended with leave of the trial judge to $305,000 after the jury returned its verdict in that amount.

[2] The Court of Appeals rejected the railroad's grounds of appeal addressed to liability and to the dismissal of a third-party claim of the railroad against the contracting company which furnished a boom truck used by the track gang. None of those questions was brought here.

road's motion, either because such review is constitutionally precluded by the provision of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," [3] or because such review is prohibited by the Federal Employers Liability Act itself. We have no occasion in this case to consider that argument, for assuming, without deciding, that the Court of Appeals was empowered to review the denial and invoked the correct standard of review, the action of the trial judge, as we view the evidence, should not have been disturbed. See *Neese, Adm'r* v. *Southern R. Co.*, 350 U. S. 77 (1955).

The trial judge filed an unreported opinion. He considered that in deciding the railroad's motion he "must indulge . . . in a fairly accurate estimate of the factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced." He concluded that the motion should be denied because, applying that standard, the relevant evidence weighed heavily in favor of the jury's assessment. His instructions to the

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[3] All 11 Courts of Appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive. *Boyle* v. *Bond*, 88 U. S. App. D. C. 178, 187 F. 2d 362 (1951); *Compania Transatlantica Espanola, S. A.* v. *Melendez Torres*, 358 F. 2d 209 (C. A. 1st Cir. 1966); *Dagnello v. Long Island R. Co.*, 289 F. 2d 797 (C. A. 2d Cir. 1961); *Russell* v. *Monongahela R. Co.*, 262 F. 2d 349, 352 (C. A. 3d Cir. 1958); *Virginian R. Co.* v. *Armentrout*, 166 F. 2d 400 (C. A. 4th Cir. 1948); *Glazer* v. *Glazer*, 374 F. 2d 390 (C. A. 5th Cir. 1967); *Gault* v. *Poor Sisters of St. Frances*, 375 F. 2d 539, 547–548 (C. A. 6th Cir. 1967); *Bucher* v. *Krause*, 200 F. 2d 576, 586–587 (C. A. 7th Cir. 1952); *Bankers Life & Cas. Co.* v. *Kirtley*, 307 F. 2d 418 (C. A. 8th Cir. 1962); *Covey Gas & Oil Co.* v. *Checketts*, 187 F. 2d 561 (C. A. 9th Cir. 1951); *Barnes* v. *Smith*, 305 F. 2d 226, 228 (C. A. 10th Cir. 1962).

jury had limited the items of damages to wages lost before trial, compensation for loss of future earnings, and past and continuing pain and suffering. His opinion detailed the items of evidence which, in his view, were sufficient to support the jury in finding that (1) wages lost before trial amounted to approximately $27,000, (2) loss of future wages based on petitioner's present salary of $6,000 per annum plus likely increases over a life expectancy of 27.5 years would amount to $150,000 present value, and (3) "an amount approaching $150,000 [would be appropriate] for plaintiff's pain and suffering—past and future." The judge conceded that the aggregate award seemed generous, but he concluded nevertheless that it was "not generous to a fault or outside the bounds of legal appropriateness." He emphasized that "the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses."

The Court of Appeals regarded its inquiry as limited to determining whether the trial judge abused his discretion in denying the railroad's motion. Its guide for that determination, the court stated, was the standard of review announced in its earlier decision in *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, 806 (1961): "we appellate judges [are] not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question

of fact with respect to which reasonable men may differ, but a question of law."[4]

We read *Dagnello*, however, as requiring the Court of Appeals in applying this standard to make a detailed appraisal of the evidence bearing on damages. Indeed this re-examination led to the conclusion in *Dagnello* that it was not a denial of justice to permit the jury's award to stand. If the Court of Appeals made a similar appraisal of the evidence in this case, the details are not disclosed in the majority opinion. Beyond attaching unexplained significance to petitioner's failure in his complaint "to ask for damages in such a large sum as $305,000," the relevant discussion is limited to the bald statement that "giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello* . . . we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000." 388 F. 2d, at 484. We have therefore made our own independent appraisal of the evidence. We conclude that the trial judge did not abuse his discretion in finding "nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a run-away jury or one that lost its head."

The liability and damage issues were tried separately before the same jury. The evidence at the trial on damages consisted of stipulated hospital and employment records, a stipulation that petitioner's life expectancy was 27.5 years, and the oral testimony of the petitioner, his medical expert, and an official of his railroad union. The railroad offered no witnesses.

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[4] The standard has been variously phrased: "Common phrases are such as: 'grossly excessive,' 'inordinate,' 'shocking to the judicial conscience,' 'outrageously excessive,' 'so large as to shock the conscience of the court,' 'monstrous,' and many others." *Dagnello* v. *Long Island R. Co.*, *supra*, at 802.

Petitioner was 41 years of age at the time of his injury and had been in the railroad's employ for over 20 years. The railroad concedes in its brief that he was earning approximately $6,000 annually and that the jury could properly find that he was entitled to $27,000 for wages already lost over the four and one-half year period between injury and judgment. The railroad further concedes that an award of $100,000 for loss of future wages would not be improper, this on the premise that invested in federal securities that sum would realize $6,000 annually. The trial judge on the other hand appraised the evidence on future earnings as sufficient to support an award of $150,000 for loss of future wages in light of the "convincing testimony not refuted . . . demonstrating the steady wage increases in recent times for work equivalent to that rendered by plaintiff, and the strong likelihood that similar increases would continue."

We cannot say that the trial judge's view that the jury might properly have awarded $150,000 for loss of future earnings is without support in the evidence. The judge had instructed the jury without objection from the railroad that they were free to find on the evidence that the injury so disabled the petitioner "that it in effect closed out his working career." Although petitioner's medical witness testified that the condition of his foot would not prevent petitioner from engaging in "sedentary work," petitioner's unchallenged evidence of his unsuccessful efforts to obtain and keep jobs of that kind might reasonably have led the jury to decide that petitioner's chances of obtaining or holding any employment were most doubtful. Petitioner testified that his applications for work had often been turned down: "when they found out I had a bad foot, they wouldn't take a chance." On one occasion when he obtained employment as a salesman during the Christmas rush, "I worked there

for about 4 or 5 days but I couldn't stand it." Moreover, the railroad refused to employ him for any kind of work when he failed a medical examination given him by a railroad physician; after being told "you failed the medical and we can't take you back," petitioner said he began receiving a "disability pension from the railroad."

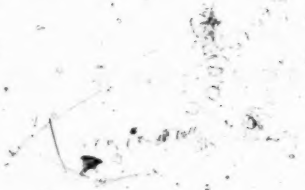
Since the jury's award for lost future earnings may properly have been as high as $150,000, its award for pain and suffering might have been as low as $128,000 rather than the $150,000 deemed permissible by the trial judge. In any event we cannot say that the trial judge's opinion that the jury might have awarded the higher $150,000 amount is without support in the record. Petitioner's injury caused his hospitalization at five different times over a period of less than two years. His foot was so badly crushed that serious infection developed. The wounds did not heal properly and skin grafts were made from his right thigh about a year after his injury. Several months later gangrene set in and his doctors were concerned that the "foot was about to die." A sympathectomy was performed, consisting of an incision of the abdomen to reach the spinal column and the sympathetic ganglia along the spine "to remove the controls which maintain the closing down of the blood vessels." This operation was successful but six months later petitioner was forced to submit to yet another operation to remove a piece of bone over the ball of the great toe. Petitioner's medical witness testified that there is still a hazard of more surgery "because this is just a mess of bones—the metatarsal has been completely crushed—the joint is completely lost—the overall black appearance of the bone—indicates decalcification or demineralization—the nourishment to the foot is so bad that the skin shows the unhealthy condition of the foot." Petitioner testified that "I always have a pain, it is like a dull toothache

to this day," and that "I just take it for granted now. It doesn't bother me now." The jury might well have concluded that petitioner suffered and would continue to suffer great pain, although he had learned to live with it. As Judge Hayes noted, 388 F. 2d, at 485, the trial judge referred to "the total absence of exaggeration" in petitioner's testimony describing "the excruciating physical pain and mental anguish" he had endured since the accident. "On the record here," said the trial judge, "[the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep seated, unrelenting and debilitating—the inducing cause of his constant misery."

We therefore conclude that the action of the trial judge should not have been disturbed by the Court of Appeals.

The judgment of the Court of Appeals is reversed and the case is remanded to that court with direction to enter a judgment affirming the judgment of the District Court.

It is so ordered.



SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1968.

Carl F. Grunenthal, Petitioner, *v.* The Long Island Railroad Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 18, 1968.]

Mr. Justice Harlan, dissenting.

I think it clear that the only issue which might conceivably justify the presence of this case in this Court is whether a United States Court of Appeals may constitutionally review the refusal of a district court to set aside a verdict for excessiveness. The Court purports not to decide that question, preferring to rest its decision upon the alleged correctness of the District Court's action in the circumstances of this case. Like my Brother Stewart, I am at an utter loss to understand how the Court manages to review the District Court's decision and find it proper while at the same time proclaiming that it has avoided decision of the issue whether appellate courts ever may review such actions.

Even assuming that this feat of legal gymnastics has been successfully performed, I believe that the correctness of this particular District Court decision, a matter whose proper resolution depends upon a detailed examination of the trial record and which possesses little if any general significance, is not a suitable issue for this Court. Accordingly, I think it appropriate to vote to dismiss the writ as improvidently granted, even though the case formally is here on an unlimited writ. See my dissenting opinion in *Protective Committee* v. *Anderson*, 390 U. S. 414, 454 (1968). To the extent that this position is inconsistent with my having joined the *per*

curiam opinion in *Neese* v. *Southern R. Co.*, 350 U. S. 77 (1955), in which the Court adopted a course similar to that followed today, I feel bound frankly to say that the incongruity of today's decision brings me face to face with the question whether that earlier disposition was correct, and that I now believe it to have been wrong.* Since the Court professes not to reach the constitutional issue in this case, I consider it inappropriate for me, as an individual Justice, to express my opinion on it.

*I feel entitled to state, by way of partial confession and avoidance of my action in *Neese*, that the writ in *Neese* was granted before I took my seat on the Court. See 348 U. S. IX, and 950 (1955).

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The Court professes not to consider the petitioner's argument that the Seventh Amendment and "the Federal Employers Liability Act itself" prohibit judicial review of a district judge's order refusing to set aside a verdict as excessive. Yet by the very act of proceeding to review the district judge's order in this case, the Court necessarily, and I think quite correctly, completely rejects that argument. I fully agree with the Court and with the 11 Courts of Appeals that "nothing in the Seventh Amendment [or in the FELA] precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." *

In *Dagnello* v. *Long Island R. Co.*, 289 F. 2d 797, the Court of Appeals for the Second Circuit, in a thorough and carefully considered opinion written by Judge Medina, articulated the standard to be followed by that court in reviewing a trial judge's refusal to set aside a verdict as excessive:

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so

* See p. —, *ante*, n. 3.

> are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law. . . ." 289 F. 2d, at p. 806.

I believe this standard of judicial review is the correct one and can think of no better way to verbalize it.

In the present case Judge Medina again wrote the prevailing opinion. This Court criticizes that opinion for not setting out "a detailed appraisal of the evidence bearing on damages." But the Court of Appeals devoted several paragraphs to a review of all the relevant particulars of the petitioner's financial loss and physical injuries, concluding its discussion of the evidence with the following passage:

> "[G]iving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello,* where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000." 388 F. 2d 480, 484.

While it is arguable that a fuller written factual discussion might have been in order, I can find no reason to suppose that the Court of Appeals did not apply the standard of judicial review that it said it was applying—the standard of the *Dagnello* case. Since I believe that standard to be the correct one, and since I further believe that review of issues of this kind in individualized personal injury cases should be left primarily to the courts of appeals, I would affirm the judgment.